Fordham International Law Journal

Volume 27, *Issue* 2 2003 *Article* 11

A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?

Donna M. Bates*

*

A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?

Donna M. Bates

Abstract

This Note discusses current consumer arbitration policies and analyzes whether traditional arbitration is adequate to address consumer disputes in the new cross-border shopping environment. Part I discusses the importance of consumer protection and reviews the consumer arbitration regimes of the United States and the European Union. Part II discusses the criticisms of the current policies toward consumer arbitration in the United States and the European Union. Part II also highlights the unique problems of consumer dispute resolution in cross-border transactions and raises some concerns unique to dispute resolution on the Internet. Part III concludes that traditional arbitration systems are not appropriate for cross-border consumer transactions, and proposes that the most prudent solution is to leave arbitration to commercial parties involved in B2B transactions.

NOTE

A CONSUMER'S DREAM OR PANDORA'S BOX: IS ARBITRATION A VIABLE OPTION FOR CROSS-BORDER CONSUMER DISPUTES?

*Donna M. Bates**

INTRODUCTION

Consumer transactions drive many national economies, and with the advent of the Internet and e-commerce,[1] consumer shopping has taken on a cross-border flavor.[2] The growth in transactional traffic increases the need for effective dispute resolution mechanisms.[3] Litigation, especially in international trans-

* J.D. Candidate, May 2004, Fordham University School of Law; B.S., United States Air Force Academy. I would like to thank my husband Andrew and my children, Nickolas and Natalie, for being so patient with me during this process.

1. *See* NUA Internet, *How Many Online, at* http://www.nua.ie/surveys/how_many_online/index.html (2004) [hereinafter *How Many Online*] (reporting there are 605.6 million people on Internet worldwide). *See also* Karen Stewart & Joseph Matthews, *Online Arbitration of Cross-Border, Business to Consumer Disputes*, 56 U. MIAMI L. REV. 1111, 1111 (2002) (predicting revenue generated by business-to-consumer ("B2C") commerce will approach that generated by business-to-business ("B2B") commerce); Llewellyn Joseph Gibbons, *Creating a Market for Justice; a Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT'L L. & BUS. 1, 2 (2002) [hereinafter Gibbons 1] (stating B2C commerce will be worth estimated USD 250 billion by end of 2003).

2. *See* Commission Press Release, IP/01/1423 (Oct. 16, 2001), *available at* http://europa.eu.int [hereinafter Commission Press Release IP/01/1423] (discussing how foreign travel, accessibility of the Internet, and introduction of Euro make consumers more aware of cross-border shopping opportunities). Increased cross-border shopping, however, may increase cross-border disputes. *Id. See also* NUA Internet, *Nielsen NetRatings: Online Spending Reaches New High in United States, at* http://www.nua.ie/surveys (Jan. 7, 2003) [hereinafter *Online Spending Reaches New High in United States*] (reporting that U.S. consumers spent nearly USD 13.7 billion online during holiday season, rising more than twenty-four percent); NUA Internet, *Nielsen NetRatings: Over GBP 1 Billion Spent Online in January, at* http://www.nua.ie/surveys (Feb. 21, 2003) (reporting e-commerce revenues in United Kingdom ("U.K.") during January totaled GBP 1 billion (USD 1.59 billion)). Online shopping also grew nineteen times faster than traditional brick-and-mortar retailing in December 2002 and increased another five percent in January 2003, representing six percent of all U.K. retail. *Id.*

3. *See* Commission Press Release IP/01/1423, *supra* note 2 (announcing establishment of European Extra-Judicial Network ("EEJ-Net")). *See also* Lucille M. Ponte, *Boosting Consumer Confidence in E-business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. 441, 442-43 (2002) (stating that lack of well-established and credible online conflict resolution

actions, may not be the most desirable choice for the parties due to unique problems in the international setting.[4] Further, failure to instill confidence in a viable dispute resolution system may discourage consumers from participating in the market.[5]

U.S. consumer protection concerns are not unique.[6] The increase in business-to-consumer ("B2C") transactions, as opposed to business-to-business ("B2B") transactions, makes it

---

mechanisms dampens consumer confidence in online marketplace and hurts e-tailers involved in cross-border transactions).

4. *See* Commission Press Release IP/01/1423, *supra* note 2 (stating that if things go wrong in cross-border purchase, traditional litigation is neither practical nor cost-effective for both consumers and business). The length and technical complexity of legal procedures, linguistic and cultural differences, and their expense, generally deter consumers from taking court action. *Id. See also* William W. Park, *In Support of International Commercial Arbitration and Litigation: The Need for Federal Legislation: Bridging the Gap in Forum Selection: Harmonizing the Law of Arbitration and Court Selection*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 19, 26-27 (1998) (noting concerns over litigation bias against foreigners inevitably chills international transactions unless relatively neutral alternative to judicial system of potential adversary exists and arbitration law already recognizes international business manager's special need for reliability in dispute resolution); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 7 (2001) [hereinafter BORN 1] (stating that popularity of arbitration as means for resolving international commercial disputes has increased significantly over past several decades and citing International Chamber of Commerce ("ICC") statistics demonstrating increase).

5. *See* EUROPEAN COMMISSION COMMENTS, DEPARTMENT OF COMMERCE ("DOC")/ FEDERAL TRADE COMMISSION ("FTC"), ALTERNATIVE DISPUTE RESOLUTION FOR CONSUMER TRANSACTIONS IN THE BORDERLESS ONLINE MARKETPLACE ¶ 8, *at* http://www.ftc.gov/bcp/altdisresolution/comments/index.htm (May 30, 2000) [hereinafter FTC Workshop Comments] (stating that current level of consumer trust is far too low to allow B2C commerce to deliver its potential, especially in cross-border trade). *See also* Commission Press Release IP/01/1423, *supra* note 2 (stating that consumers' perception that legal action is only means of redress can be major disincentive to cross-border shopping); Committee on Consumer Policy, OECD, Consumers in the Online Marketplace: The OECD Guidelines Three Years later, DSTI /CP (2002) 4 Final, at 4 (Feb. 3, 2003), *available at* www.oecd.org [hereinafter OECD Guidelines] (indicating that much of potential for B2C e-commerce has yet to be realized due to consumers' concerns about shopping online).

6. *See* NICHOLAS LOCKETT & MANUS EGAN, UNFAIR TERMS IN CONSUMER AGREEMENTS: THE NEW RULES EXPLAINED 9 (1995) (discussing development of consumer protection programs in European Union ("E.U.")). The first consumer protection program of 1974 recognized that there were widespread abuses arising from the growing marketplace, increasing diversity, and complex goods and services offered to customers. *Id.* Consumers had gradually failed to maintain a balanced position with suppliers and most contractual terms had become heavily slanted toward the supplier. *Id. See also* David Byrne, Consumer Protection — Past and Future, Speech at the Belgian Presidency Conference, *available at* http://europa.eu.int/comm/consumers/speeches.htm (Oct. 4, 2001) (discussing changing context of consumer protection in European Union and stressing importance of consumer policy).

likely that disputes will arise between parties from different Nations.[7] Efforts have been made to address arbitration's viability as an Alternative Dispute Resolution ("ADR") method in consumer transactions, but a consensus over how great the risks are and how to address them remains evasive.[8]

This Note discusses current consumer arbitration policies and analyzes whether traditional arbitration is adequate to address consumer disputes in the new cross-border shopping environment. Part I discusses the importance of consumer protection and reviews the consumer arbitration regimes of the United States and the European Union. Part II discusses the criticisms of the current policies toward consumer arbitration in the United States and the European Union. Part II also highlights the unique problems of consumer dispute resolution in cross-border transactions and raises some concerns unique to dispute resolution on the Internet. Part III concludes that traditional arbitration systems are not appropriate for cross-border consumer transactions, and proposes that the most prudent solution is to leave arbitration to commercial parties involved in B2B transactions.

---

7. *See, e.g.*, FTC, E-consumer Complaints: Top Consumer and Company Locations, *available at* http://www.econsumer.gov (Jan. 1 - June 30, 2003) (providing list of countries with largest consumer complaints). The five nations with the largest number of consumer complaints were Australia, Belgium, Canada, United Kingdom, and the United States. *Id.* The largest number of consumer complaints was against companies in Canada, Nigeria, Spain, the United Kingdom, and the United States. *Id. See also* Ponte, *supra* note 3, at 461 (stating that e-businesses must take into account "global electronic marketplace" when deciding online dispute resolution options); Gibbons 1, *supra* note 1, at 3 (stating that reality is B2C e-commerce is growing at phenomenal rate and that fastest area of growth in e-commerce is brick and mortar merchants with strong trademarks who create equivalent e-commerce site which provides e-consumers with illusion, if not reality, of dispute resolution process).

8. *See, e.g.*, Ponte, *supra* note 3 (suggesting revision of current Consumer Protocol to meet unique needs and challenges of online B2C environment); Christopher R. Drahozal & Raymond J. Friel, 28 N.C. J. INT'L L. & COM. REG. 357, 384 (2002) (proposing Internet merchants vary standard form contracts and dispute resolution procedures based on differing regulatory schemes and legal rules); Mary Shannon Martin, *Keep it Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-commerce*, 20 B.U. INT'L L.J. 125, 130-31 (advocating various methods of online Alternative Dispute Resolution ("ADR")); Stewart & Matthews, *supra* note 1 (concluding that there is no uniform system in place for international online B2C disputes and development of independent, self-regulating, and enforceable online process would provide stability needed for cross-border B2C commerce to flourish).

I. *ARBITRATION AND THE CONSUMER*

A. *National Government Interests in Protecting Consumers*

National governments generally take steps to protect consumers,[9] either through legislation such as the Magnuson-Moss Warranty Act ("MMWA"),[10] Truth in Lending Act ("TILA"),[11] the European Directive Against Unfair Terms in Consumer Contracts ("Consumer Directive"),[12] or consumer education and assistance for filing claims.[13] Entities such as the Better Business

---

9. *See, e.g.*, A. Brooke Overby, *An Institutional Analysis of Consumer Law*, 34 VAND. J. TRANSNAT'L L. 1219 (2001) (exploring revival of interest in consumer protection in United States and European Union and its impact on consumer movement). The current revival in consumer protection seeks to build upon and reinterpret issues raised and resolved decades earlier. *Id.* at 1220. Many of the principal consumer protection statutes in the United States were enacted during the 1960s and 1970s. *Id.* at 1220-21. Consumer protection concerns are prevalent in E.U. legislation. *See also* Commission of the European Communities, Green Paper on European Union Consumer Protection, COM (2001) 531 Final (Oct. 2, 2001) [hereinafter Green Paper] (discussing various E.U. legislation aimed at protecting consumers). *See, e.g.*, Council Directive No. 93/13, O.J. L 95/29 (1993) [hereinafter Consumer Directive] (establishing Directive on unfair terms in consumer contracts); Council Directive No. 97/7, O.J. L 144/19 (1997) [hereinafter Distance Selling Directive] (establishing Directive on protection of consumers in distance contracts); Commission Recommendation, O.J. L 115/31 (1998) [hereinafter 1998 Commission Recommendation] (establishing principles applicable to bodies responsible for out-of-court settlement of consumer disputes); Commission Recommendation, O.J. L 109/56 (2001) (establishing principles for out-of-court bodies involved in the consensual resolution of consumer disputes).

10. 15 U.S.C. §§ 2301-2312 (2000) (establishing Magnuson-Moss Warranty Act ("MMWA") that provides U.S. consumer protections relating to product warranties).

11. 15 U.S.C. §§ 1601-1667 (2000) (establishing Truth in Lending Act ("TILA") that provides U.S. consumer protections for consumer credit transactions).

12. *See* Consumer Directive, *supra* note 9 (establishing Council Directive No. 93/13, O.J. L 95/29 (1993)). *See also* LOCKETT & EGAN, *supra* note 6 (discussing details of Consumer Directive); Green Paper, *supra* note 9, at 2.1 (evaluating E.U. Consumer Directive and discussing origin of E.U. consumer protection laws). The Green Paper states:

> The goals of consumer protection are to deliver a system of regulation that: achieves as high as possible a level of consumer protection whilst also keeping costs to business to a minimum; is as simple as possible and is sufficiently flexible to respond quickly to the market, and which involves stakeholders as much as possible; and provides legal certainty and ensures its efficient and effective enforcement, especially in cross-border cases. *Id.*

13. *See, e.g.*, EEJ-Net Gears Up to Take on Cross-Border Consumer Disputes, Oct. 2001, *at* http://europa.eu.int/comm/dgs/health_consumer/newsletter/200110/02_en.htm [hereinafter EEJ-Net Article] (discussing establishment of EEJ-Net on Oct. 16, 2002). The EEJ-Net was established to make it easier for consumers to seek redress in conflicts with suppliers from other E.U. countries, as well as Norway and Iceland. *Id.* Each E.U. country sets up a "clearing house" where consumers can obtain information and access existing ADR systems. *Id.*; Commission Press Release IP/01/1423, *supra* note

Bureau ("BBB") in the United States and Frontier Centers in the United Kingdom may provide assistance to consumers.[14] More formal redress is usually provided by legislation enforced through agencies such as the U.S. Federal Trade Commission ("FTC") and the U.K. Office of Fair Trading ("OFT").[15] Consumer arbitration is criticized as possibly displacing the government's role in consumer protection,[16] resulting in unconscionable transactions and dispute resolution methods.[17] In the

---

2 (explaining reasons why EEJ-Net was established and protections it offers to E.U. consumers). *See also,* Econsumer.gov website, *at* http://www.econsumer.gov (providing general information about consumer protection in all countries in International Consumer Protection Enforcement Network ("ICPEN"), contact information for authorities in those countries, and online complaint forms); FTC, For Consumers: Consumer Information, *at* http://www.ftc.gov/ftc/consumer.htm (offering general information and links to additional avenues of information to consumers who have concerns about unfair, deceptive, or fraudulent practices).

14. *See* Overby, *supra* note 9, at 1276 (discussing that both United States and European Union rely on informal consumer complaint mechanisms such as U.S. Better Business Bureau ("BBB") and U.K. Consumer Advise Centers and trade associations). The European Union has also opened "frontier centers" in European cities to provide information on consumer issues and consumer law. *Id. See, e.g.*, EEJ-Net Article, *supra* note 13 (explaining how EEJ-Net allows each E.U. country to set up a "clearing house" where consumers can obtain information and access existing ADR systems); Better Business Bureau website, *at* http://www.dr.bbb.org/comsensealt/index.asp (offering informal dispute settlement options for businesses and their customers).

15. *See* Overby, *supra* note 9, at 1276-77 (stating that formal methods include employing agencies, such as FTC and OFT to enforce consumer rights, using primarily injunctions or cease and desist orders as remedies). *See, e.g.*, 15 U.S.C. §§ 2301-2312 (2000) (establishing MMWA for consumer product warranty protections); §§ 1601-1667 (2000) (establishing TILA for protections for consumer credit transactions); Consumer Directive, *supra* note 9 (establishing E.U. Consumer Directive on unfair terms in consumer contracts).

16. *See* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 37 (1997) (stating that concerns that rigorous enforcement of adhesive pre-dispute arbitration clauses gives large firms power to displace judiciary from its role in enforcing common law claims and statutory rights). *See also* Justin Kelly, *ABA Litigation Section to Examine Arbitration Complaints*, Nov. 5, 2002, *available at* http://www.adrworld.com (stating American Bar Association's ("ABA") Litigation Section has received complaints that arbitration has moved into regulatory and statutory cases and expressing concerns that arbitrators fail to grasp underlying law); Richard M. Alderman, *Pre-Dispute Mandatory Arbitration In Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1263 (2001) (asserting that strategic use of pre-dispute arbitration agreements creates incentive for organizations subject to federal or state regulation to use arbitration as device to break social legislation). Pre-dispute mandatory arbitration precludes access to the courts and frustrates the implementation of existing consumer rights and effectively precludes the development of new ones. *Id.* at 1264.

17. *See* Alderman, *supra* note 16, at 1263 (stating strategic use of pre-dispute mandatory arbitration agreements seriously impedes assertion of legal rights and elimi-

United States, arbitration of consumer statutory claims is allowed under the Federal Arbitration Act ("FAA"),[18] as long as the consumer can vindicate his statutory rights.[19] Some suggest, however, that arbitration agreements instead serve as prospective waivers of statutory rights[20] and therefore courts should reject them because they allow commercial parties to "legislate" at the expense of the consumer.[21]

---

nates potential for precedent-setting case law). *See also* Amer. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968) (quoting Wilko v. Swan, 346 U.S. 427, 438 (1953), *rev'd on other grounds*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)) (pointing out that American courts have expressed consumer concerns as conflict between federal statutory protection of large segment of public, frequently in inferior bargaining position, and encouragement of arbitration as prompt, economical, and adequate solution for disputes). Similar concerns exist in the European Union. *See, e.g.*, Consumer Directive, *supra* note 9, at ¶ 9 (stating that economic interests of consumers should be protected against abuse of power by seller or supplier, in particular against one-sided standard contracts and unfair exclusion of essential rights in contracts).

18. *See, e.g.*, Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 89 (2000) (reaffirming that federal statutory claims can be appropriately resolved through arbitration and upholding arbitration agreement for consumer's TILA and Equal Credit Opportunity Act ("ECOA") claims against lender). *See generally* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987) (establishing principal that streamlined procedures of arbitration do not entail consequential restriction on substantive rights). *See also* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 245 (3d ed. 1999) (discussing further Supreme Court cases that established enforceability of agreements to arbitrate statutory claims).

19. *See Green Tree*, 531 U.S. at 90 (holding that statute serves its functions so long as prospective litigant effectively may vindicate his statutory cause of action in arbitral forum); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (holding arbitration of Age Discrimination in Employment Act ("ADEA") claims appropriate). *But see* Schwartz, *supra* note 16, at 110 (criticizing Supreme Court's enforcement of predispute arbitration clauses and its presumption that arbitration clauses substitute one procedurally fair forum for another).

20. *See* Schwartz, *supra* note 16, at 110 (criticizing Supreme Court's ruling that there is no prospective waiver of statutory rights). Lower courts have adopted the Supreme Court's reasoning, even though there seems to be no explanation for it other than a prospective waiver would "nullify the purposes" of a statute. *Id.* at 1111. *See also* PUBLIC CITIZEN'S CONGRESS WATCH, THE COSTS OF ARBITRATION 52 (Apr. 2002) [hereinafter PUBLIC CITIZEN] (determining that arbitration prevents vindication of statutory rights in four ways). Arbitration prevents vindication of statutory rights by (1) the cost barrier; (2) uncertainty about costs; (3) costs of companion cases and satellite litigation; and (4) information costs arising from arbitration. *Id.* at 52-58.

21. *See* Schwartz, *supra* note 16, at 60 (suggesting pre-dispute arbitration clauses are particularly troubling where regulated relationships are involved). Where the legislature has already deemed it necessary to restrict the drafting party's power to "legislate" at the expense of the adherent, an arbitration clause allows the drafting party to change the fundamental background rule set up by the legislature. *Id. See also* Kelly, *supra* note 16 (stating ABA Litigation Section has received complaints that arbitration has moved into regulatory and statutory cases and expressing concerns that arbitrators

B. *The Importance of Accessible Consumer Dispute Resolution*

Technology has opened up a new landscape where transactions are possible between parties that probably would not have done business together before.[22] Studies in the United States and Europe indicate consumer trust is far too low to allow B2C e-commerce to deliver its potential.[23] Furthermore, consumers have genuine concerns about purchasing in a cross-border marketplace.[24] Inconsistent methods of handling consumer disputes may encourage an uneven playing field and disadvantage consumers who already have difficulties navigating the legal terminology and allocating responsibilities in B2C contracts.[25] Busi-

---

fail to grasp underlying law); Alderman, *supra* note 16, at 1263 (asserting that strategic use of pre-dispute arbitration agreements creates incentive for organizations subject to federal or State regulation to use arbitration as device to break social legislation).

22. *See How Many Online*, *supra* note 1 (reporting there are 605.60 million people on Internet worldwide); Stewart & Matthews, *supra* note 1, at 1111 (predicting revenue generated by B2C commerce will approach that generated by B2B commerce). *See also* Drahozal & Friel, *supra* note 8, at 357 (discussing how arbitration is increasingly being used between businesses and consumers); Caroline E. Mayer, *No Suits Allowed; Increasingly, Arbitration Is the Only Recourse*, WASH. POST, July 14, 2002, at H01 (stating that until one decade ago most arbitrations pitted two businesses against each other in contract dispute, and then it spread to disagreements between companies and their customers).

23. *See, e.g.*, FTC Workshop Comments, *supra* note 5, at ¶ 8 (stating current level of consumer trust is far too low to allow B2C commerce to deliver its potential, especially in cross-border trade); Commission Press Release IP/01/1423, *supra* note 2 (stating that consumers' perception that legal action is only means of redress can be major disincentive to cross-border shopping); OECD Guidelines, *supra* note 5, at 4 (indicating that much of potential for B2C e-commerce has yet to be realized due to consumers' concerns about shopping online).

24. *See* FTC Workshop Comments, *supra* note 5, at ¶ 8 (stating consumer concerns include (1) concerns over contract fulfillment, (2) uncertainty about how to complain and seek redress, (3) consumer usually bears all transaction risk because payment tends to be made before receipt, (4) security risk of transmitting financial and personal details, (5) e-commerce sites are less tangible than "bricks and mortar" shops, and (6) poor design and lack of transparency on websites); Ponte, *supra* note 3, at 442 (stating that lack of uniform laws or court system leaves e-consumers with no real means of redress and dampens consumer confidence in online marketplace). The global nature of the Internet challenges national sovereignty and traditional court authority and amplifies concerns about choice of law and enforceability of judgments. *Id.* *See also* Karen Alboukrek, *Adapting to a New World of E-Commerce: The Need for Uniform Consumer Protection in the International Electronic Marketplace*, 35 GEO. WASH. INT'L L. REV. 425, 434 (2003) (explaining that legal questions raised by consumer's e-commerce purchase from foreign company are particularly difficult to address because not certain which laws apply). The consumer risks the probability of losing home country protections and having to travel to a foreign forum and an unfamiliar legal system to resolve the dispute. *Id.* Businesses are also potentially subjected to complying with hundreds of different consumer protection laws in each country they do business in. *Id.*

25. *See, e.g.*, Consumer Directive, *supra* note 9, at ¶ 2 (stating that laws of Member

nesses may also desire to structure contracts and dispute resolution clauses differently to accommodate local rules, adding to commercial inefficiency and legal uncertainty.[26]

C. *Consumer Arbitration Is Not Welcome Everywhere: U.S. v. E.U. Policy*

There are many ways consumer disputes may be addressed, including negotiation, mediation, and arbitration.[27] The focus of this Note is arbitration that includes binding pre-dispute agreements to adjudicate a dispute in a non-judicial forum, a

---

States relating to contract terms between sellers or suppliers of goods and services on the one hand, and consumers on the other show many disparities). This results in national markets differing from each other, and distortions of competition may arise amongst the sellers and suppliers, notably when they sell and supply in other Member States. *Id.* Consumers in the global online marketplace also face different legal systems and even more uncertain territory in cyberspace. *See, e.g.*, Ponte, *supra* note 3, at 442 (stating there are no uniform laws or unified court systems in cyberspace and lack of well-established and credible dispute resolution systems can dampen consumer confidence in online marketplace).

26. *See, e.g.*, Drahozal & Friel, *supra* note 8, at 378 (noting top computer manufacturers modify arbitration clauses in consumer purchase agreements based on consumer's locality). For sales in the United States, Dell and Gateway computer companies included binding arbitration clauses in their consumer contracts. *Id.* For sales in the United Kingdom, none of the three companies included a binding arbitration clause in its consumer contracts. *Id.* Instead, the contract provided for settlement of disputes in court. *Id.* Gateway expressly provided for arbitration if both parties agreed after a dispute arose and had a pre-dispute arbitration clause in its contracts with business customers. *Id.* Drahozal and Friel concluded that Gateway may have included such a clause in its consumer contracts if it were permitted to by law. *Id. See also* Alboukrek, *supra* note 24, at 434 (stating that uncertainty of dispute resolution procedures between international buyers and sellers subjects businesses to possibility of complying with hundreds of different consumer protection laws in countries that seek to regulate business activities).

27. *See* GOLDBERG ET AL., *supra* note 18, at 3 (describing forms of ADR including negotiation and third-party processes such as mediation and arbitration). The critical distinguishing factor between mediation and arbitration is that in mediation the neutral assists the disputants in arriving at their own solution, and in arbitration or adjudication the neutral has the power to impose a solution. *Id. See also* Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term "ADR" Has Begun to Outlive its Usefulness*, 2000 J. DISP. RESOL. 97, 100 (2000) (stating that when ADR movement was in its infancy made great deal of sense to group together non-litigation processes as binding arbitration, mediation, and early neutral evaluation and emphasize their joint differences from litigation); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 32 (3d ed. 1999) (describing that wide definition of ADR could include any method of resolving disputes other than those adopted by courts of law as part of system of justice established and administered by States, but recognizing that ADR term is not always used so broadly, and suggesting arbitration be excluded from ADR).

process very different from non-binding mediation.[28] Commercially active Nations, such as the United States and Member States of the European Union, use the ADR methods available very differently in the resolution of consumer disputes.[29]

1. United States

The Federal Arbitration Act ("FAA") governs federal U.S. arbitration.[30] State statutes such as the Revised Uniform Arbitration Act ("RUAA")[31] or Uniform Arbitration Act ("UAA")[32] gov-

28. *See* Sternlight, *supra* note 27, at 102 (stating ADR conferences often highlight visceral disconnect between arbitration and mediation); GOLDBERG ET AL., *supra* note 18, at 123 (describing mediation as negotiation carried out with assistance of third party and stating that in contrast to arbitrator or judge, mediator has no power to impose outcome on disputing parties); REDFERN & HUNTER, *supra* note 27, at 32 (suggesting that arbitration not be included as example of ADR because it presents alternative to judicial process in offering privacy to parties and procedural flexibility but is nonetheless fundamentally same in that role of arbitrator is judgmental and his function is not to decide how problem resulting in dispute can most easily be resolved so much as to apportion responsibility for that problem).

29. *See* Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 843 (2002) [hereinafter Sternlight 2] (noting treatment of mandatory consumer and employment arbitration is quite different in countries outside United States). The E.U. position on consumer arbitration is fairly clear. *Id.* This does not mean that mandatory consumer arbitration occurs in no other jurisdictions, but it is difficult to track mandatory consumer arbitration, which appears to not occur in other countries, especially those that are non-English-speaking. *Id. See also* Stewart & Matthews, *supra* note 1, at 1115 (stating European Union is prolific in drafting laws designed to protect online consumers); Drahozal & Friel, *supra* note 8, at 384 (comparing different U.S. and E.U. policies on consumer arbitration).

30. *See* 9 U.S.C. §§ 1-16 (2002) (establishing Federal Arbitration Act ("FAA")). The FAA applies to:

> commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

9 U.S.C. § 1. *See also* 5 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER FAA 5-6 (1999 supp.) (discussing FAA enactment in 1925 and application of section 2 which establishes federal nature of act). If a dispute is in federal court under diversity, the respective State arbitration statute may apply if interstate commerce is not involved. *See, e.g.*, Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956) (holding arbitration provisions in employment agreement made in New York between New York residents but performable in Vermont not interstate commerce).

31. *See* Uniform Arbitration Act (2000), *available at* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm [hereinafter Revised Uniform Arbitration Act ("RUAA")] (establishing RUAA that was enacted in 2000 to update previously enacted Uniform Arbitration Act ("UAA"). The RUAA was enacted in response to the increased use of arbi-

ern state arbitration. Sections 2 and 3 of the FAA apply to international arbitration.[33]

The FAA was enacted to reverse a historical hostility toward arbitration in the United States.[34] Courts repeatedly emphasize that states cannot restrict the parties' ability to enter into arbitration agreements[35] and state legislation is frequently preempted for conflicting with the FAA's goals.[36] Therefore, any state con-

---

tration, greater complexity of disputes resolved by arbitration, and legal developments in the area. *Id.* at prefatory note ¶ 1. *See also* Sarah Rudolph Cole, *The Revised Uniform Arbitration Act: Is it the Wrong Cure?*, 8 DISP. RESOL. MAG., Summer 2002, at 10 n.1 [hereinafter Cole 1] (stating that Hawaii, Nevada, New Mexico and Utah have adopted RUAA). The RUAA has been introduced as legislation in many other States. *Id.* at 10 n.2; Uniform Law Commissioners, Uniform Arbitration Act, *at* http://www.nccusl.org/nccusl/DesktopDefault.aspx (listing legislative status of RUAA implementation for various States).

32. *See* GOLDBERG ET AL., *supra* note 18, at 627 (stating UAA is uniform law governing State arbitration procedures). The UAA was adopted by the National Conference of Commissioners on Uniform State Laws in 1955. *Id.* Thirty-five jurisdictions adopted the UAA, and fourteen others adopted similar legislation. *Id.*

33. 9 U.S.C. §§ 201-208 (2000) (codifying New York Convention); 9 U.S.C. §§ 301-307 (2000) (codifying Inter-American Convention).

34. *See* BORN 1, *supra* note 4, at 35 (stating that well into twentieth century, U.S. courts were hostile towards arbitration and judges refused to grant specific enforcement of arbitration agreements). *See also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (stating FAA was enacted in 1925 to help promote arbitration as alternative to litigation). The FAA's purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts. *Id.*; Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (citing FAA's goals as justification for instituting "liberal federal policy favoring arbitration agreements").

35. *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273 (1995) (holding that words "involving commerce" are interpreted broadly, and are functional equivalent of "affecting" commerce, so broader reading of FAA is correct); Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 477 (1989) (holding State law preempted if it actually conflicts with federal law to extent it stands as obstacle to accomplishment and execution of full purposes and objectives of Congress); Basura v. U.S. Home Corp., 120 Cal. Rptr. 2d 328, 333 (Cal. Ct. App. 2002) (holding FAA preempted state law that allowed purchaser to pursue construction and design defect action against developer in court despite signed arbitration agreement). *See also* GOLDBERG ET AL., *supra* note 18, at 235 (stating that FAA displaces State law in State courts to extent State law conflicts with goals or policies of FAA).

36. *See* GOLDBERG ET AL., *supra* note 18, at 235 (discussing when FAA displaces State law governing arbitration). *See, e.g.*, *Allied-Bruce Terminix*, 513 U.S. at 268 (holding void Alabama statute that made written and pre-dispute arbitration agreements invalid and unenforceable because State statute directly conflicted with section 2 of FAA); *Basura*, 120 Cal. Rptr. at 333 (holding FAA preempted State law that allowed purchaser to pursue construction and design defect action against developer in court despite signed arbitration agreement). *See generally* Cole 1, *supra* note 31, at 10-13 (discussing FAA preemption problem in relation to RUAA). *See also Volt Info. Sciences*, 489 U.S. at

sumer law aimed at singling out arbitration will not be enforced.[37] New federal legislation recently proposed in Congress may institute consumer protections in arbitration, but attempts have so far proved unsuccessful.[38]

---

477 (holding State law preempted to extent it actually conflicts with federal law, and stands as obstacle to accomplishment, execution of full purposes, and objectives of Congress). To ensure private arbitration agreements are enforced according to their terms, the FAA preempts State laws that require judicial forum for resolution of claims when parties agreed to resolve them by arbitration. *Id. But see* BORN 1, *supra* note 4, at 335 (discussing interpretation of *Volt Info. Sciences* decision as requiring application of State law rules governing arbitration agreements where parties have agreed to choice-of-law clause selecting State law).

37. *See* 9 U.S.C. § 2 (stating written arbitration provision shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract); Stephen L. Hayford & Carroll E. Neesemann, *A Response to RUAA Critics: Codifying Modern Arbitration Law, Without Preemption*, 8 DISP. RESOL. MAG., No. 4, Summer 2000, at 15-16 (stating any effort by States to level playing field in employment, consumer or other area, by establishing rule of law per se invalidating adhesion arbitration agreements, is doomed to failure, and any legislation that places arbitration agreement (adhesion or otherwise) on unequal footing vis-à-vis other contracts will be preempted by FAA); GOLDBERG ET AL., *supra* note 18, at 252 (recognizing that Supreme Court has held that States may not enact legislation aimed at protecting unwary party from unknowingly surrendering right to sue). *See, e.g.*, Doctor's Assoc., Inc. v. Casarott, 517 U.S. 681, 683 (1996) (concerning Mont. Code Ann. § 27-5-114(4) that declared arbitration clause unenforceable unless notice that contract is subject to arbitration is typed in underlined capital letters on first page of contract); Joder Bldg. Corp. v. Lewis, 569 A.2d 471, 473 (Vt. 1989) (refusing to enforce Vermont statute 12 V.S.A. § 5652(b) that required arbitration agreement to clearly state signing agreement forecloses any court remedies concerning any dispute and statement be displayed prominently).

38. *See, e.g.*, H.R. 2258, 106th Cong. (1999) (proposing but failing to pass Consumer Fairness Act of 1999 which would treat unilaterally imposed arbitration clauses on consumers as unfair and deceptive trade practices and would prohibit them in consumer transactions); H.R. 1296, 107th Cong. (2001) (proposing but failing to pass in Senate, Motor Vehicle Franchise Contract Arbitration Fairness Act which provides for use of arbitration to resolve dispute only after parties to controversy consent in writing to use arbitration after dispute arises); S. 192, 107th Cong. (2001) (proposing but failing to pass Consumer Credit Fair Dispute Resolution Act of 2001 that makes unenforceable and invalid written provisions in consumer credit contracts that involve settlement of disputes to arise under contract by arbitration). *See also* Robert S. Bennett & David M. Medearis, *Mandatory Arbitration Hits Home*, 17 TEXAS LAWYER, No. 50, June 3, 2001, at 15 (stating New Mexico recently adopted Fair Bargain Act, which applies to all standard form contracts or leases). The Act is an attempt to make arbitration fairer to consumers, and since it applies across-the-board to form contracts, whether they include a mandatory arbitration clause, the act is not anti-arbitration, but pro-fair-arbitration, which is consistent with the philosophy of the Federal Arbitration Act, and should survive pre-emption challenges. *Id.*; Marcia Coyle, *Anti-Arbitration Bills Set off A Classic Brawl*, 24 NAT'L L. J., Aug. 12, 2002, at A8 (stating that there are several arbitration bills currently proposed to Congress). Bills S. 1140 and H.R. 1296 say that arbitration may be used to settle controversies stemming from motor vehicle franchise contracts only if both parties consent after the dispute arises. *Id.* Bills H.R. 1051 and H.R. 2531 deal with high-cost mortgage transactions by amending the TILA and Home Ownership and

U.S. courts were traditionally reluctant to enforce pre-dispute agreements to arbitrate statutory claims,[39] but in 1985, the Supreme Court ruled that parties do not forgo substantive rights in arbitration, but rather trade a judicial forum for arbitration.[40] U.S. Courts have since upheld arbitration agreements involving various statutory claims,[41] and generally enforce binding pre-dis-

---

Equity Protection Act to prohibit arbitration clauses that limit the right of borrowers to seek relief in court. *Id.* H.R. 2053 would not allow home builders to consent to mandatory arbitration agreements as a condition to entering into a home building contract. *Id.*; Sarah E. Larson, *Current Public Law and Policy Issue: An Examination of the Broad Scope of the Federal Arbitration Act and Binding Mandatory Consumer Arbitration Agreements: Not The Answer To Racial Bias In the U.S. Legal System*, 24 HAMLINE J. PUB. L. & POL'Y 293, 323-25 (2003) (discussing that federal lawmakers are introducing legislation to protect consumers such as H.R. 2258, H.R. 1296, and S. 192 against unknowingly giving up right to court and jury in arbitration agreements).

39. *See* GOLDBERG ET AL., *supra* note 18, at 244 (explaining that reluctance to enforce arbitration agreements involving statutory claims rested on court's view that legislative intent in creating statutory right would be frustrated if that right were not effectively enforced, and on belief that effective enforcement in arbitration was doubtful). This was also due to the belief that arbitration enforcement conflicted with the legislative intent to enforce the statutes. *Id.* The uneasiness centered on the arbitrators' inability to properly apply the law to disputes, highlighting the constitutional concerns of arbitration's procedural differences. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 438 (1953) (holding that arbitration agreement unenforceable for Securities Act claims), *rev'd*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989). The *Wilko* Court reasoned that the effectiveness of the Securities Act was lessened in arbitration as compared to judicial proceedings. *Id.* at 435. The case required subjective findings on the purpose and knowledge of an alleged violator of the Act, and they must be determined and applied by the arbitrators without judicial instruction on the law. *Id.* at 435-36. Because the award may be made without explanation and without a complete record of proceedings, the arbitrators' conception of the legal meaning of such statutory requirement as "burden of proof," "reasonable care," or "material fact," cannot be examined, and power to vacate an award is limited. *Id.* at 436. *See also* Amer. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827-28 (2d Cir. 1968) (holding pervasive public interest in enforcement of antitrust laws, and nature of claims that arise in such cases, combine to make antitrust claims inappropriate for arbitration).

40. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymoth, Inc., 473 U.S. 614, 625 (1985) (holding that by agreeing to arbitrate statutory claim, a party does not forgo substantive rights afforded by statute; it only submits to their resolution in arbitral, rather than judicial forum, trading court procedures and opportunity for review for simplicity, informality, and expedition of arbitration); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (holding that Securities Exchange Act of 1934 ("SEA") and Racketeer Influenced and Corrupt Organization Act ("RICO") claims were arbitrable). *See also* GOLDBERG ET AL., *supra* note 18, at 245 (discussing series of Supreme Court cases beginning in 1985 that took strong pro-arbitration stance in statutory claims cases); Schwartz, *supra* note 16, at 98-99 (discussing Court's decision in *McMahon* that held arbitration agreement of statutory claims enforceable).

41. *See, e.g.*, Cole v. Burns Int'l Security Serv., 105 F.3d 1465 (D.C. Cir. 1997) (holding Title VII claims subject to arbitration); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 20 (1991) (dealing with Age Discrimination in Employment Act);

pute arbitration clauses.[42]

In response to recent court decisions regarding prohibitive arbitration costs to consumers,[43] the primary U.S. arbitration providers recently instituted separate consumer arbitration protocols.[44] The new protocols are meant to accommodate consum-

---

McMahon, 482 U.S. at 220 (dealing with RICO claims); *Rodriguez de Quijas*, 490 U.S. at 477 (holding SEA claims arbitrable); Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 92 (2000) (enforcing agreement to arbitrate TILA claims); Davis v. S. Energy Homes, Inc., 305 F.3d 1268, 1268 (11th Cir. 2002) (holding claims under MMWA arbitrable).

42. *See* Drahozal & Friel *supra* note 8, at 374 (discussing enforceability of pre-dispute arbitration agreements); Sternlight 2, *supra* note 29, at 835 (discussing U.S. policy enforcing pre-dispute arbitration agreements with consumers and employees). *See also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) (holding consumer arbitration agreement for termite extermination services valid, reasoning that when Congress enacted FAA, it had needs of consumers as well as others in mind).

43. *See, e.g.*, *Green Tree*, 531 U.S. at 90 (holding existence of large arbitration costs could preclude litigant from effectively vindicating federal statutory rights in arbitral forum); Camacho v. Holiday Homes, Inc., 167 F. Supp. 2d 892, 897 (W.D. Va. 2001) (holding arbitration clause in contract for purchase of manufactured home unenforceable because arbitral forum was financially inaccessible to purchaser and prevented vindication of statutory rights under TILA); Mendez v. Palm Harbor Homes, 45 P.3d 594 (Wash. Ct. App. 2002) (declining to compel arbitration of mobile homeowner's claim because filing and administrative costs of American Arbitration Association ("AAA") arbitration would be prohibitively high); Brower v. Gateway 2000, Inc., 676 N.Y.S. 2d 569 (1st Dept. 1998) (holding cost of $4,000 for consumer arbitration through ICC unconscionable given cost of dispute, and $500 filing fee through AAA also likely unconscionable). *See also* National Arbitration Forum ("NAF"), *In Order for Arbitration With Consumers to Comply with the Law, The Process Must be Fundamentally Fair* (on file with author) [hereinafter NAF Article] (stating that given several recent decisions, cost of arbitration to consumers will be major issue). NAF analyzed the issue and determined that the consumer's cost of arbitration may some day become the deciding factor in whether a court determines an agreement fair or unconscionable and confirms or invalidates the arbitration clause. *Id.*

44. *See, e.g.*, AAA Supplementary Procedures for Consumer-Related Disputes (July 1, 2003) [hereinafter AAA Consumer Rules], *at* http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\..\focus Area\consumer\AAA236current.htm (applying consumer rules when agreement stipulates AAA rules apply and agreement is between consumer and business); NAF Code of Procedure (July 1, 2003), *at* http://www.arb-forum.com/code/070103.pdf [hereinafter NAF Consumer Rules]; Judicial Arbitration and Mediation Services ("JAMS") Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness (Apr. 2003), *at* http://www.jamsadr.com/images/PDF/Consumer_Arbitration_Min_Std-2003.pdf [hereinafter JAMS Consumer Rules] (stating JAMS will only administer arbitrations between companies and individual consumers if arbitration clause and specified rules comply with minimum standards of fairness). *See generally* Sternlight 2, *supra* note 29, at 842-43 (discussing recent self-regulation by some arbitration organizations with employment and consumer protocols). Neither protocol, however, contains an enforcement mechanism, and it is not clear what response a con-

ers on items such as costs,[45] remedies,[46] and award procedures.[47] It should be noted, however, that the new consumer protocols only apply to arbitrations conducted under organizational rules, such as those of the AAA.[48]

The AAA changed its fee structure for consumers,[49] and expanded the authority of the arbitrator to grant any remedy, re-

---

sumer will receive if he raises an objection with the administering organization, or arbitrators, that the arbitration process does not meet the consumer protocols. *Id.* at 842.

45. *See, e.g.*, AAA Consumer Rules, *supra* note 44, at § C-8 (setting out AAA policy on consumer arbitration costs conducted under AAA Consumer Rules); NAF Consumer Rules, *supra* note 44, at app. C (setting out NAF policy on consumer arbitration costs conducted under NAF Consumer Rules); JAMS Consumer Rules, *supra* note 44, at ¶ 7 (setting out JAMS policy on consumer arbitration costs conducted under JAMS Consumer Rules).

46. *See, e.g.*, AAA Consumer Rules, *supra* note 44, at §§ C-1(d), C-7(c) (stating parties can still take their claim to court); NAF Consumer Rules, *supra* note 44, at R. 5(I) (stating arbitrator shall follow applicable substantive law and grant any remedy or relief provided by law); JAMS Consumer Rules, *supra* note 44, at ¶ 3 (stating remedies to consumer under applicable laws must remain available under arbitration clause unless consumer maintains right to pursue such remedies in court).

47. *See, e.g.*, AAA Consumer Rules, *supra* note 44, at § C-7(c) (stating award is final and binding and subject to review in accordance with applicable statutes governing arbitration awards, but noting that arbitrator should apply any pertinent contract terms, statutes, and legal precedents); JAMS Consumer Rules, *supra* note 44, at ¶ 10 (stating arbitration award will consist of concise written statement of essential findings and conclusions on which award is based).

48. *See, e.g.*, AAA Consumer Rules, *supra* note 44 (citing AAA Consumer Protocol); NAF Consumer Rules, *supra* note 44 (citing NAF Consumer Protocol); JAMS Consumer Rules *supra* note 44 (citing JAMS Consumer Protocol). Businesses are still free to conduct arbitration proceedings *ad hoc* or under different institutional rules where the consumer protocols previously mentioned do not apply. *See also* Drahozal & Friel, *supra* note 8, at 376-77 (discussing AAA's efforts to promote fairness in consumer arbitration and stating use of such protocols by businesses might enhance enforceability of arbitration agreements and awards).

49. *See, e.g.*, AAA Consumer Rules, *supra* note 44, at § C-8 (establishing that amount consumer pays under Consumer Rules varies based on size and nature of claim). Arbitrator's fees are a USD 250 deposit for a desk arbitration or telephone hearing, and USD 750 per day for an in-person hearing. *Id.* Consumers pay half of the arbitrator's fees up to a maximum of USD 125 for a claim that does not exceed USD 10,000 and half the arbitrator's fees up to a maximum of USD 375 for claims greater than USD 10,000 but not exceeding USD 75,000. *Id.* If a claim exceeds USD 75,000, then consumers must pay an administrative fee in accordance with the Commercial Fee Schedule. *Id.* The consumer must also deposit half of the arbitrator's compensation. *Id.* The arbitrator's compensation rate is set forth in the panel biography provided to the parties when the arbitrator is appointed. *Id.* Consumer claims under USD 10,000 are resolved on a document basis, and if a hearing is requested, then the Expedited Procedures of the Commercial Dispute Resolution Procedures apply. *Id.* at §§ C-5, C-6. *See also* PUBLIC CITIZEN *supra* note 20, at 42-47, 50-51 (comparing costs of court adjudication and arbitration for three hypothetical consumer claims by three major arbitration organizations, including AAA).

lief or outcome available in court.[50] There is a fee waiver provision,[51] and parties have the option to use small claims court.[52] The National Arbitration Forum ("NAF") changes also lower fees to consumers,[53] and contain an indigency rule that allows a waiver of arbitration fees.[54]

Judicial Arbitration and Mediation Services ("JAMS") does not administer arbitrations between consumers and companies unless the arbitration agreement complies with certain mini-

---

50. *See* AAA Consumer Rules, *supra* note 44, at § C-7 (addressing trend for arbitration agreements in consumer cases to preclude remedies such as damages, attorney's fees and punitive damages, even though statute allows such remedies). *See, e.g.*, Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998) (refusing to compel arbitration where arbitration agreement limited Title VII plaintiff to contract damages, thereby drastically restricting relief to which plaintiff was otherwise entitled under Title VII); Ex parte Thicklin, 824 So. 2d 723, 732 (Ala. 2002) (holding unenforceable arbitration provision that immunized party from liability for punitive damages because failure to allow such damages violated State public policy).

51. *See* AAA Administrative Fees Waiver/Deferral/Hardship Provisions (July 1, 2003), *at* http:// http://www.adr.org/index2.1.jsp?JSPssid=15711&JSPsrc=upload\LIVESITE\focusArea\consumer\Administrative%20Fee%20Waivers%20and%20Pro%20Bono%20Arbitrators%20Services.htm#AAAAdminFeesWaiver_Deferral_Hardship (stating there are waiver/deferral/hardship provisions in cases where AAA administrative fees apply). Parties are eligible for consideration for a waiver or deferral if their annual gross income falls below 200 percent of the federal poverty guidelines. *Id. But see* PUBLIC CITIZEN, *supra* note 20, at 75 (questioning effectiveness of such waivers, pointing out that under AAA fee waiver provisions, single person earning more than USD 17,720 would not qualify for waiver).

52. *See* AAA Consumer Rules, *supra* note 44, at introduction ¶ 2 (providing option to either party only if amount of money sought falls within limits set for small claims courts in state in which they live or operate). *See also* AAA Consumer Rules, Questions and Answers [hereinafter AAA Questions and Answers], *at* http://www.adr.org/index2.1.jsp?JSPssid=15711&JSPsrc=upload\LIVESITE\focusArea\consumer\Consumer%20QA.htm (discussing small claims court option).

53. *See, e.g.*, NAF Consumer Rules, *supra* note 44, R. 5(F), app. C (separating fee schedule into common claims of USD 15,000 or less, common claims of USD 15,001-74,999, large claims of USD 75,000 and above). *See also* NAF Article, *supra* note 43 (giving examples of filing fees such as USD 49 for disputes less than USD 1,000, and USD 150 for disputes less than USD 15,000). *See also* PUBLIC CITIZEN, *supra* note 20 (comparing costs of court adjudication and arbitration for three hypothetical consumer claims by three major arbitration organizations).

54. *See* NAF Consumer Rules, *supra* note 44, R. 5(H), 45 (establishing alternative procedures where consumer indigent). *See also* AAA Administrative Fees Waiver/Deferral/Hardship Provisions, *supra* note 51 (stating there are waiver/deferral/hardship provisions in cases where AAA administrative fees apply). *But see* PUBLIC CITIZEN, *supra* note 20, at 75-76 (arguing that fee waivers are inadequate because the only fees waived are filing fees, and consumer still has to pay for half of cost of arbitrator's hourly fees and expenses). Public Citizen also argues that the fee waivers only shift the fees to more frequent users of arbitration, like labor unions. *Id.* at 76.

mum standards.[55] Consumer arbitration costs are based on a fixed fee, and costs shift to the company involved in the dispute.[56] Arbitrators must also provide a written statement of the findings and conclusions on which the award is based.[57] Similar to the AAA, remedies available to the consumer under applicable law must remain available under the arbitration clause,[58] and special notice and small claims court procedures apply.[59]

2. European Union

In 1993, the Council of the European Union issued a Directive on Unfair Terms in Consumer Contracts (the "Consumer Directive").[60] It applies to contracts between sellers or suppliers and consumers, and only deals with terms that are not individu-

---

55. *See* JAMS Consumer Rules, *supra* note 44 (stating JAMS will only administer arbitrations between companies and individual consumers if arbitration clause and specified rules comply with minimum standards of fairness).

56. *See id.*, at ¶ 7 (setting consumer's fee at USD 175 when consumer is initiating party and all other costs are borne by company). When the company is the initiating party, the company pays all arbitration costs. *Id. See also* PUBLIC CITIZEN, *supra* note 20 (comparing costs of court adjudication and arbitration for three hypothetical consumer claims by three major arbitration organizations); Press Release, Public Citizen's Report of JAMS Arbitration Costs Corrected (Aug. 12, 2002), *at* http://www.jamsadr.com/display_press.asp?id=300 (correcting JAMS fee charged to consumers from USD 7,950 claimed in report to USD 125 fee with balance of costs paid by company).

57. *See* JAMS Consumer Rules, *supra* note 44, at ¶ 10 (requiring arbitrators to provide reasoning for award).

58. *See id.* at ¶ 3 (establishing that consumers must retain statutory remedies in JAMS consumer arbitration). The JAMS standards do not require the availability of remedies if the consumer retains the right to pursue the unavailable remedies in court. *Id. See also* Press Release, JAMS, Mandatory Consumer Arbitration Must Be Fair For Partries-Nation's Largest Private Provider of Dispute Resolution Services Testifies Before Committee on the Judiciary (Feb. 12, 2002) [hereinafter JAMS Press Release], *available at* http://www.jamsadr.com/display_press.asp?id=240 (discussing testimony of JAMS Vice President and General Counsel before California State Assembly Committee defending JAMS policies on consumer arbitration).

59. *See id.* at ¶ 2 (establishing notice provisions and requiring that consumers be given notice of arbitration clause and its existence, terms, conditions and implications must be clear); *id.* at ¶ 1 (establishing parties cannot be precluded from seeking remedies in small claims court for disputes or claims within scope of court's jurisdiction). *See also* JAMS Press Release, *supra* note 58 (stating consumers have absolute right to go to court on claims below USD 5000).

60. *See* Consumer Directive, *supra* note 9 (establishing E.U. consumer protection legislation). *See also* Sternlight 2, *supra* note 29 at 844-48 (discussing Consumer Directive and consumer arbitration in European Union). *See generally* LOCKETT & EGAN, *supra* note 6 (explaining history and application of Directive). Lockett and Egan tout the Directive as arguably the most important piece of E.U. legislation passed in the field of contract law. *Id.* at 7. The authors, however, admit that there remain a number of glaring loopholes, primarily for large numbers of people classified by the Commission

ally negotiated by the parties.[61] Unfair terms under the Consumer Directive are not binding on consumers.[62] Unfairness looks to the requirements of good faith[63] and whether an arbitration clause causes a significant imbalance in the parties' rights and obligations that acts to the detriment of the consumer.[64] Terms must also be drafted in plain, intelligible language[65] and consumers must have the opportunity to examine all contract

---

as underprivileged consumers who remain largely ignorant of their rights or are vulnerable to abuse. *Id.* at 18.

61. *See* Drahozal & Friel, *supra* note 8, at 363-64 (discussing transactions between sellers and consumers where Consumer Directive applies and stating that the Consumer Directive would probably cover standard form contracts with consumers). *See, e.g.*, Consumer Directive, *supra* note 9 (excluding contracts in employment, succession rights, rights under family law, incorporation and organization of companies, and partnership agreements). The Consumer Directive only applies to contract terms that have not been individually negotiated. *Id.* *See also* LOCKETT & EGAN, *supra* note 6, at 21-22 (stating contract terms drafted in advance, especially if part of pre-formulated contract, may be non-negotiated). If a contract contains both negotiated and non-negotiated terms, the Directive still applies to the contract if it appears that the contract as a whole is pre-formulated. *Id.*

62. *See* LOCKETT & EGAN, *supra* note 6, at 21-26 (discussing test of fairness and stating Member States are required to provide under national law that unfair terms in consumer contracts not be binding on consumers). This does not mean that the entire contract is void. *Id.* Consumers or the consumer organization generally makes an assertion that a term was not individually negotiated, and the seller or supplier will have to demonstrate otherwise. *Id.* The burden of proof is on the seller or supplier to demonstrate that a term was individually negotiated with the consumer. *Id.* at 22. *See also* Consumer Directive, *supra* note 9 (providing annex of potentially unfair terms referenced in art. 3(3) of Consumer Directive); Sternlight 2, *supra* note 29 at 844-45 (stating that Consumer Directive provided that unfair terms in consumer contracts are not valid).

63. *See* Consumer Directive, *supra* note 9, art. 3(1) (establishing that contractual term not individually negotiated shall be regarded as unfair if, contrary to requirement of good faith, it causes significant imbalance in parties' rights and obligations arising under the contract to detriment of the consumer). *See also* LOCKETT & EGAN, *supra* note 6, at 22-23 (pointing out that preamble provides definition of good faith which is further supported by list of potentially unfair terms indicated in Consumer Directive annex). The good faith test does not seem to be affected by the honesty or dishonesty of the supplier or seller, but rather measures unfairness by whether the contractual term causes a significant imbalance in the parties' rights and obligations. *Id.*; Drahozal & Friel, *supra* note 8, at 364 (stating concept of unfairness is nebulous but is detailed further in regulations and in Consumer Directive).

64. *See* Consumer Directive, *supra* note 9, art. 3 (using "significant imbalance" in parties' rights and obligations to determine unfairness). *See also* LOCKETT & EGAN, *supra* note 6, at 23 (stating "significant imbalance" is not defined in Consumer Directive, but indications are that cases involving minor detriment to consumer would not be construed as unfair); Drahozal & Friel, *supra* note 8, at 364 (discussing application of significant imbalance in rights of consumer to his or her detriment in Consumer Directive).

65. *See* Consumer Directive, *supra* note 9, art. 5 (stating that terms in writing must be drafted in plain and intelligible language). Any doubt as to meaning is construed in

terms.[66]

Member States must ensure consumers do not lose the Directive's protections where a non-Member State's law is applicable to the contract.[67] There is also a requirement to prevent continued use of unfair terms, for example by allowing consumer protection organizations to bring actions on behalf of the consumer.[68] The Consumer Directive also allows Member States to adopt national legislation providing more stringent protections than those of the Directive.[69]

Most notable to arbitration, the Consumer Directive contains a non-exhaustive list of potentially unfair terms such as un-

---

favor of the consumer. *Id.* *See also* LOCKETT & EGAN, *supra* note 6, at 25 (providing discussion of Consumer Directive's requirement of intelligibility).

66. *See* Consumer Directive, *supra* note 9, pmbl. (stating that consumer should actually be given an opportunity to examine all terms). *See also*, LOCKETT & EGAN, *supra* note 6, at 25 (stating that it could be construed as requiring seller or supplier to provide copies of all contract terms, or ensuring that consumer actually understands effect of relevant terms).

67. *See* Consumer Directive, *supra* note 9, art. 6(2) (requiring Member States to ensure consumer does not lose protections granted by Consumer Directive where choice of law of non-Member State applies to contract if latter has close connection with territory of Member States). *See also* LOCKETT & EGAN, *supra* note 6, at 27-28 (describing how Consumer Directive handles consumer contracts in non-E.U. States). The Consumer Directive contemplated a non-Member State possibly circumventing the fairness requirements by including provisions in the contract that placed it under a non-E.U. country's jurisdiction. *Id.*

68. *See* Consumer Directive, *supra* note 9, art. 7 (stating Member States must make provisions available for persons or organizations having legitimate interests in protecting consumers to bring action). *See also* LOCKETT & EGAN, *supra* note 6, at 28-29 (describing Consumer Directive requirements to prevent unfair terms in consumer contracts and stating action must be brought before a court or administrative body that determines whether consumer contract provision is unfair, and then that body is empowered to apply appropriate and effective means to prevent continued use of such terms). Actions may also be brought against trade associations that recommend unfair terms. *Id.* at 29; Drahozal & Friel, *supra* note 8, at 372-73 (stating U.K. Office of Fair Trading ("OFT") consistently requires businesses to delete pre-dispute binding arbitration clauses or give consumers option to arbitrate after dispute arises in cases involving even sellers of high-priced goods such as automobiles).

69. *See* Consumer Directive, *supra* note 9, art. 8 (providing that Member States may adopt or retain most stringent provisions compatible with Treaty in area covered by Consumer Directive, to ensure maximum degree of protection for consumer). This is combined with the preamble that allows Member States to continue or introduce national legislation which affords consumers a higher level of protection than that stipulated in the Directive. *Id.* at pmbl. *See also* LOCKETT & EGAN, *supra* note 6, at 31 (discussing that Consumer Directive permits more stringent national legislation and addressing potential problem of allowing individual Member States to develop more stringent requirements).

seen terms[70] and restrictions on legal remedies.[71] Even though the Directive does not ban mandatory arbitration of consumer disputes outright, the practice has effectively been adopted.[72]

National legislation in each Member State, such as the English Arbitration Act, 1996 ("English Arbitration Act") in the United Kingdom, implements the Consumer Directive and governs consumer arbitration.[73] The English Arbitration Act incor-

---

70. *See* Consumer Directive, *supra* note 9, annex (i) (referring to binding terms consumer had no real opportunity of becoming acquainted with before conclusion of contract). *See also* LOCKETT & EGAN, *supra* note 6, at 40-42 (discussing unseen terms and stating consumer must have real opportunity of becoming acquainted with terms, which may require terms to be explained by seller or supplier, or at least consumer be given opportunity to get independent legal advice).

71. *See* Consumer Directive, *supra* note 9, annex (q) (referring to exclusion or hindrance of consumer's right to take legal action or exercise other legal remedies). *See also* LOCKETT & EGAN, *supra* note 6, at 48-49 (stating restrictions on legal remedies provision is most applicable to arbitration agreements and provision does not prohibit arbitration clauses in consumer contracts, but places restrictions on their use); Sternlight 2, *supra* note 29, at 844-48 (stating Consumer Directive includes non-enforcement of contractual provision excluding or hindering consumers' right to take legal action or other legal remedy, particularly by requiring consumer to take disputes exclusively to arbitration). It appears that if an arbitration agreement refers to a body not governed by legal provisions, or restricts the use of evidence normally available to the consumer, it might be deemed unfair. *Id.* at 845. Unfair clauses could also be where sellers or suppliers seek to reverse the legal burden of proof to their own advantage, even where sellers or suppliers attempt to argue such clauses were individually negotiated. *Id.*

72. *See* Sternlight 2, *supra* note 29, at 845-46 (describing Consumer Directive's restrictions on consumer arbitration agreements). *See also* 1998 Commission Recommendation, *supra* note 9 (establishing Recommendation on principles applicable to bodies responsible for out-of-court settlement of consumer disputes and taking position that it is inherently unfair for company to require consumer to resolve future disputes through binding arbitration); Sternlight 2, *supra* note 29, at 846 (stating that 1998 Commission Recommendation takes same position as many mandatory arbitration critics in United States that inherently unfair for company to require consumer to resolve future disputes through binding arbitration rather than in court); Ponte, *supra* note 3, at 461-62 (discussing how national laws in countries such as England do not allow binding predispute consumer arbitration). *See, e.g.*, European Database on Case Law about Unfair Contractual Terms ("CLAB database"), at http://europa.eu.int/clab/index.htm (providing database that contains examples of rulings on consumer disputes and unfair terms under Consumer Directive).

73. *See* English Arbitration Act 1996 (1996), *available at* http://www.hmso.gov.uk/acts/acts1996/96023—a.htm [hereinafter English Arbitration Act]. The English Arbitration Act applies when the seat of arbitration is in England, Wales, or Northern Ireland. *See also* BORN 1, *supra* note 4, at 31 (stating there were previously three Arbitration Acts in England, enacted in 1950, 1975, and 1979); Drahozal & Friel, *supra* note 8, at 371-72 (discussing consumer arbitration in United Kingdom under English Arbitration Act).

porates the Consumer Directive[74] and makes pre-dispute arbitration clauses ineffective against consumers when the amount of a potential claim is less than GBP 5,000 (approximately USD 9,068),[75] but the practice seems to be that binding pre-dispute arbitration clauses are prohibited in consumer transactions.[76]

3. Primary Differences

Unlike the United States, the European Union does not allow binding pre-dispute arbitration agreements with consumers.[77] U.S. consumer arbitration is instituted mostly through binding pre-dispute arbitration clauses[78] and the burden rests on

---

74. *See* English Arbitration Act, *supra* note 73, at § 89 (extending Consumer Directive to English Arbitration Act). *See also* Drahozal & Friel, *supra* note 8, at 371-72 (discussing Consumer Directive's incorporation into English Arbitration Act); Ponte, *supra* note 3, at 461-62 (discussing how national laws in countries such as England do not allow consumers to agree to use ADR until after conflict arises).

75. *See* English Arbitration Act, *supra* note 73, at § 91 (establishing that compulsory arbitration clause that applies to amount less than certain pecuniary amount is automatically unfair); Unfair Arbitration Agreements (Specified Amount) Order 1999, SI 2167, s. 33 (specifying that arbitration agreement is unfair where less than amount of GBP 5,000 is involved); The Universal Currency Converter, *at* http://www.xe.com (offering monetary conversion amounts). *See also* Drahozal & Friel, *supra* note 8, at 372 (stating that OFT guidance explains that such term is always unfair regardless of circumstances, and is both legally ineffective and open to regulatory sanctions in all cases); Sternlight 2, *supra* note 29, at 847 (stating that arbitration agreements invalid for amounts less than GBP 5,000 and validity of arbitration clauses for claims above that amount are judged on case-by-case basis); Ponte, *supra* note 3, at 461-62 (discussing how national laws in countries such as England do not allow consumers to agree to use ADR until after conflict arises).

76. *See* Sternlight 2, *supra* note 29, at 847-48 (stating that as practical matter appears mandatory pre-dispute arbitration clauses prohibited in consumer transactions in Britian). *See also* Drahozal & Friel, *supra* note 8, at 372-73 (discussing cumulative effect of English Arbitration Act on consumer arbitration and stating that if pre-dispute binding arbitration clause is not deleted, has to be revised to give consumers option to arbitrate after dispute arises); Ponte, *supra* note 3, at 456-57 (discussing how European Union requires complete transparency as to terms and conditions of consumer contracts).

77. *See* Sternlight 2, *supra* note 29, at 846 (comparing 1998 Commission Recommendation prohibiting arbitration of future disputes with position of many U.S. critics and stating practical effect is disallowance of pre-dispute arbitration agreements with consumers). *See also* Ponte, *supra* note 3, at 461-62 (discussing how national laws in E.U. Member States do not allow consumers to agree to use ADR until after conflict has arisen); 1998 Commission Recommendation, *supra* note 9 (establishing Recommendation on principles applicable to bodies responsible for out-of-court settlement of consumer disputes and taking position that it is inherently unfair for company to require consumer to resolve future disputes through binding arbitration).

78. *See* Drahozal & Friel *supra* note 8, at 374 (discussing enforceability of pre-dispute arbitration agreements in United States); Sternlight 2, *supra* note 29, at 835 (dis-

consumers to demonstrate a recognized ground for non-enforcement of the agreement or award.[79] In contrast, it appears that the European Union will not enforce such clauses.[80] Member States utilize extensive consumer protection laws and policies to level the playing field in commercial activity.[81] Under the Consumer Directive, a business maintains the burden of proving the agreement was individually negotiated.[82] Further, Member States rely heavily on government agencies, such as the U.K. OFT to protect consumer rights, and allows such agencies to

---

cussing U.S. policy enforcing pre-dispute arbitration agreements with consumers and employees). *See also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) (holding consumer arbitration agreement for termite extermination services valid, reasoning that when Congress enacted FAA, it had needs of consumers as well as others in mind).

79. *See* Ponte, *supra* note 3, at 456 (stating U.S. system emphasizes efficiency and costs and places burdens of discovering terms of contract on consumers). *See also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (holding party resisting arbitration bears burden of proving claims at issue are unsuitable for arbitration). *See, e.g.*, Green Tree Financial Corp-Alabama v. Randolph, 531 U.S. 79, 92 (2000) (holding consumer bears burden of showing likelihood of incurring excessive arbitration costs to have arbitration agreement invalidated); 9 U.S.C. § 10 (2000) (setting out statutory grounds under FAA for vacation of arbitration awards).

80. *See* FTC Workshop Comments, *supra* note 5 (expressing E.U. opposition to binding consumer arbitration in on-line disputes in response to June 2000 FTC workshop). *See also* Sternlight 2, *supra* note 29, at 846-47 (discussing E.U. response to FTC workshop that binding pre-dispute consumer arbitration is disfavored). *See generally* CLAB Database, *supra* note 72, at card no. GB000492 (on file with author) (providing examples of consumer cases where terms found unfair under Consumer Directive). Terms in consumer contracts have been found unfair where it was difficult for the consumer to complain of defective goods. *Id.* Misleading terms that possibly deprived consumers of fair access to remedies in the event of a dispute have also been deleted from consumer contracts. *Id.* at card no. GB000298 (on file with author).

81. *See* Ponte, *supra* note 3, at 456 (stating European Union requires complete transparency of terms and conditions in consumer contracts throughout entire contracting process). *Id.* at 457. This standard requires disclosure of hidden terms in the fine print or in materials subsequently delivered with the goods. *Id. See also* Sternlight 2, *supra* note 29 at 844-48 (discussing Consumer Directive and consumer arbitration in European Union). *See generally* LOCKETT & EGAN, *supra* note 6 (discussing requirements of Consumer Directive).

82. *See* Consumer Directive, *supra* note 9, art. 3(2) (establishing that where any seller or supplier claims standard term has been individually negotiated, burden of proof in this respect shall be incumbent on him, but term shall always be regarded as not individually negotiated where drafted in advance and consumer has therefore not been able to influence substance of term, particularly in context of a pre-formulated standard contract). *See also* Drahozal & Friel, *supra* note 8, at 363 (discussing that transactions between sellers and consumers where terms not individually negotiated are covered under Consumer Directive); LOCKETT & EGAN, *supra* note 6, at 21-22 (stating contract terms drafted in advance, especially if part of pre-formulated contract, may be non-negotiated).

bring actions on behalf of consumers.[83] In contrast, the United States relies on private individual legal enforcement actions.[84] Finally, in the United States, state attempts to pass consumer protection legislation regarding arbitration are preempted by the FAA.[85] The European Union, in comparison, sets out a broad policy of consumer protection in the Consumer Directive and explicitly allows passage of more stringent national legislation.[86]

---

83. *See* Drahozal & Friel, *supra* note 8, at 372-73 (stating OFT consistently requires business to either delete pre-dispute binding arbitration clauses or give option of arbitration after dispute arises). *See also* CLAB Database, *supra* note 72 (proving examples of consumer cases where terms found unfair under Consumer Directive and demonstrating that OFT frequently handles complaints made by consumers, with result that unfair terms are deleted from contracts).

84. *See* Sternlight 2, *supra* note 29, at 844 (stating that where many other countries rely heavily on government agencies to protect rights of consumers, United States tends to rely on individual legal enforcement actions). *See, e.g.*, 15 U.S.C. §§ 2301-2312 (2000) (establishing MMWA for consumer product warranty protections); 15 U.S.C. §§ 1601-1667 (2000) (establishing TILA for protections for consumer credit transactions). *But see* Overby, *supra* note 9, at 1276 (discussing that United States does rely on informal consumer complaint mechanisms such as BBB to resolve disputes).

85. *See* GOLDBERG ET AL., *supra* note 18, at 235 (discussing when FAA displaces State law governing arbitration). *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995) (holding void Alabama statute that made written, pre-dispute arbitration agreements invalid and unenforceable because state statute directly conflicted with section 2 of FAA); Basura v. U.S. Home Corp., 120 Cal. Rptr. 2d 328, 333 (Cal. Ct. App. 2002) (holding FAA preempted state law that allowed purchaser to pursue construction and design defect action against developer in court despite signed arbitration agreement). *See generally* Cole 1, *supra* note 31, at 10-13 (discussing FAA preemption problem in relation to RUAA). *See also* Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 477 (1989) (holding State law preempted to extent it actually conflicts with federal law to extent it stands as obstacle to accomplishment and execution of full purposes and objectives of Congress). To ensure private arbitration agreements are enforced according to their terms, the FAA preempts state laws that require judicial forum for resolution of claims when parties agreed to resolve them by arbitration. *Id.* *But see* BORN 1, *supra* note 4, at 335 (discussing interpretation of *Volt Info. Sciences* decision as requiring application of State law rules governing arbitration agreements where parties have agreed to choice-of-law clause selecting State law).

86. *See* Consumer Directive, *supra* note 9, art. 8 (providing that Member States may adopt or retain most stringent provisions compatible with Treaty in area covered by Consumer Directive, to ensure maximum degree of protection for consumer). This is combined with the preamble that allows Member States to continue or introduce national legislation which affords consumers a higher level of protection than that stipulated in the Directive. *Id.* at pmbl. *See also* LOCKETT & EGAN, *supra* note 6, at 31 (discussing that Consumer Directive permits more stringent national legislation and addressing potential problem of allowing individual Member States to develop more stringent requirements).

II. *CRITICISMS OF CONSUMER ARBITRATION SYSTEMS*

A. *Consumer Arbitration is Very Different Than Commercial Arbitration*

The vision of arbitration as a speedy, informal, and inexpensive alternative to formal adjudication has lured disputants for centuries.[87] Arbitration offered claimants and congested courts promising alternatives to litigation[88] and many parties seized the opportunity.[89] It was particularly helpful to commercial parties as preferential to litigation in foreign courts and offered some guarantee of enforceability and finality.[90] In time, non-commer-

87. *See* Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 242-43 (1928) (stating historians have suggested arbitration was used in ancient Athens and Rome). *See also* GOLDBERG ET AL., *supra* note 18, at 233 (stating arbitration was used as early as thirteenth century by English merchants who preferred to have disputes resolved according to own customs rather than public law). *See also* Stewart & Matthews, *supra* note 1, at 1112 (pointing out international arbitration of B2B disputes developed early in history of global trade). *But see* Alderman *supra* note 16, at 1237-38 (noting that ADR only began to dominate discussions of American legal system approximately twenty-five years ago).

88. *See, e.g.*, Schwartz, *supra* note 16, at 123 (discussing how court congestion and crowded dockets helped make argument for "federal judicial policy favoring arbitration agreements"); Bryant G. Garthy, *Symposium: Ethics in a World of Mandatory Arbitration*, 18 GA. ST. U. L. REV. 927, 929 (2002) (stating that early idea was that arbitration allowed individuals to tell their stories and allowed litigants to perceive more legitimate form of justice). *See also* Dr. Ljiljana Biukovic, *International Commercial Arbitration in Cyberspace: Recent Developments*, 22 NW. J. INT'L L. & BUS. 319, 331 (2002) (stating that arbitration is typically favored by business people because it allows almost total control of dispute resolution proceedings and awards are enforceable with assistance of national courts).

89. *See, e.g.*, AAA Questions and Answers, *supra* note 52 (stating AAA had more than 230,000 cases filed with it in 2002). Areas of dispute included finance, construction, labor and employment, insurance, and technology. *Id. See also* Cameron L. Sabin, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1339 (2002) (noting that over five year period, AAA arbitrations increased approximately 145 percent, from roughly 55,800 in 1995 to 136,673 in 1999). JAMS caseload increased more than 2,300 percent from 1987 to 1993, averaging 1,200 cases per month in 1993. *Id.*; BORN 1, *supra* note 4, at 13 (stating popularity of arbitration as means for resolving international commercial disputes has increased significantly over past several decades and citing ICC statistics that caseloasd now exceeds 500 cases per year to demonstrate increase).

90. *See, e.g.*, Stewart & Matthews, *supra* note 1, at 1112 (stating that early in global trade history, international business parties to dispute faced possibility that one party would be subject to laws and jurisdiction of foreign courts). Preference developed for arbitration of international disputes as a way to avoid concerns about the parochial nature of national courts. *Id. See also* BORN 1, *supra* note 4, at 7 (stating international arbitration is perceived as ensuring genuinely neutral decision-maker, where international disputes inevitably involve risk of litigation before national court of one of parties which may be biased, parochial, or unattractive for some other reason); Biukovic, *supra* note 88, at 331 (stating that arbitration is typically favored by business people because it

cial participants became commonplace,[91] and control of the process shifted from the parties themselves to attorneys and law firms.[92] This new pro-arbitration landscape[93] raises doubts as to

---

allows almost total control of dispute resolution proceedings and awards are enforceable with assistance of National courts); GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS 2 (1999) [hereinafter BORN 2] (stating arbitration produces definitive and binding award generally capable of enforcement through national court proceedings); REDFERN & HUNTER, *supra* note 27, at 7 (stating importance that agreement to arbitrate is capable of enforcement at law or else would only be statement of intention and not legally binding). It would be of little use to enforce an obligation to arbitrate in one country if it could be evaded by litigation in another. *Id.* Therefore, as far as possible, the agreement to arbitrate is given effect internationally. *Id. See also* PUBLIC CITIZEN, *supra*, note 20 (recognizing arbitration eliminates protracted appellate litigation); GOLDBERG ET AL., *supra* note 18, at 234 (discussing that courts will nearly always respect provision that arbitrator's decision is final and binding, which discourages appeals to courts and makes provisions for finality meaningful).

91. *See* Drahozal & Friel, *supra* note 8, at 357 (stating that arbitration is increasingly used to resolve disputes between businesses and consumers). In the U.K., the Chartered Institute of Arbitrators administers a number of consumer arbitration schemes for various businesses. *Id.* at 358. *See, e.g.*, Chartered Institute of Arbitrators Website, *at* http://www.arbitrators.org (last visited Jan. 21, 2004) (offering information for arbitrators, mediators, and adjudicators, and providing rules and additional information for those involved in ADR). *See also* Mayer, *supra* note 22 (stating that until one decade ago most arbitrations pitted two businesses against each other in a contract dispute, and then it spread to disagreements between companies and their customers).

92. *See* Garthy, *supra* note 88, at 930 (discussing how arbitration process moved out of hands of parties and into law firms and attorneys that specialize in arbitration). The process is now controlled by an elite group of judges, retired judges, commercial courts, mediators, and arbitrators who provide tailor-made justice geared specifically to large business disputes. *Id. See, e.g.*, Faye A. Silas, *McJustice: Mediation Franchising Begins*, 71 A.B.A. J. 17 (1986) (describing franchised offices of United States Arbitration, Inc. and explaining that ADR is growing field where many flowers will grow). United States Arbitration, Inc. joins other providers such as Chicago-based EnDispute, Philadelphia-based Judicate, and Phoenix-based Civicourt to provide such services. *Id. See also* William C. Smith, *Much To Do About ADR: Alternative Dispute Resolution Has Found A Place In The U.S. Justice System and In Most Practices. But To Use ADR Effectively, Lawyers Must Be Aware of Its Problems As Well As Its Promise*, 86 A.B.A. J., June 2000, at 62 (stating that lawyers have put their indelible mark on ADR, and now ADR mechanisms entail more rules, more delay and more expense even though ADR was designed to avoid such problems).

93. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (ruling that section 2 of FAA creates body of federal substantive law applicable to any arbitration agreement under FAA which requires that questions of arbitrability be addressed with healthy regard for federal policy favoring arbitration and that any doubts concerning scope of arbitrable issues be resolved in favor of arbitration); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (holding that in construing arbitration agreement under FAA, parties' intentions control, but those intentions are generously construed as to issues of arbitrability); Volt Info. Sciences, Inc. v. Bd. of Trustees, 489 U.S. 468, 475-76 (1989) (holding due regard must be given to the federal policy favoring arbitration, and ambiguities as to scope of arbitration clause itself resolved in favor of arbitration). *See also* GOLDBERG ET AL., *supra* note 18, at 235 (stating that both FAA and UAA) make agreements to arbi-

fairness, efficiency, and legal due process,[94] values normally protected by consumer legislation.[95]

In today's market, consumers, knowingly or not, accept arbitration agreements in retail transactions for computer software[96] and home purchases.[97] They also agree to arbitrate disputes over telephone service[98] and on-line auction transactions.[99] In

---

trate specifically enforceable and there is strong public policy in favor of arbitration). Both federal and State courts will interpret agreements to arbitrate broadly and exceptions narrowly. *Id.*

94. *See* Gibbons 1, *supra* note 1, at 15-16 (stating that there are already signs of dangers of unchecked arbitration in domestic context, including arbitration clauses that through choice of arbitral forum, arbitral institution, cost, or other substantive or procedural rules render right to arbitration nugatory while denying consumers effective access to courts). *See also* Garthy, *supra* note 88, at 927 (noting major concerns in literature include fairness of processes and relationship of processes to consumer protection and enforcement of various statutory rights in such areas as securities, anti-discrimination, and antitrust laws). Such concerns also apply to consumer statutory arbitration. *See, e.g.*, Ponte, *supra* note 3, at 449-50 (noting how State and federal court challenges to widespread use of ADR clauses in wide range of commercial agreements has raised issues of fundamental fairness, particularly in consumer disputes). Such concerns center on whether a party knowingly and voluntarily waived its right to seek redress in the courts and whether the ADR process adequately protected the parties' procedural and substantive rights. *Id.* at 449.

95. *See* Alderman, *supra* note 16, at 1263 (stating developments in mandatory arbitration create incentive for organizations subject to regulation to use arbitration as device to blunt or break social legislation). The limited capacity of arbitration in disputes over statutory rights coupled with the finality of the award could water down the protection provided for the other party, if not undermine the public policies underlying the regulatory legislation. *Id. See, e.g.*, Davis v. S. Energy Homes, Inc., 305 F.3d 1268 (11th Cir. 2002) (dealing with arbitration of written warranty claim on manufactured home under MMWA); Specht v. Netscape Communications Corp., 306 F.3d 17 (2d Cir. 2002) (dealing with claims against provider of computer software programs for violation of federal Electronic Communications Privacy Act ("ECPA") and Computer Fraud and Abuse Act ("CFAA")).

96. *See, e.g.*, *Specht*, 306 F.3d at 21 (dealing with claims against provider of computer software programs for violation of ECPA and CFAA); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 570 (1st Dept. 1998) (dealing with consumer claims for computers and software products purchased from Gateway 2000).

97. *See, e.g.*, Green Tree Financial Corp-Alabama v. Randolph, 531 U.S. 79 (2000) (dealing with arbitration of claim by mobile home purchaser under TILA and Equal Credit Opportunity Act ("ECOA")); Walton v. Rose Mobile Homes L.L.C., 298 F.3d 470, 478-79 (5th Cir. 2002) (dealing with claims by mobile home purchaser under MMWA); Davis v. Southern Energy Homes, Inc., 305 F.3d 1268, 1280 (11th Cir. 2002), *cert. denied*, 123 S.Ct. 1633 (2003) (dealing with mobile home purchaser's claims under MMWA).

98. *See, e.g.*, Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002), *cert. denied*, 124 S. Ct. 53 (2003) (dealing with contract provisions phone service provider sought to impose on customers through arbitration for long distance service); Lozano v. AT&T Wireless, 216 F. Supp. 2d 1071 (C.D. Cal. 2002) (dealing with consumer class action claim against cellular service provider regarding arbitration agreement). *See also* Paul

the United States, attempts to limit consumer arbitration have resulted in unenforceable state statutes, such as those in Montana[100] and Vermont.[101] Inconsistent judicial application of federal consumer statutes such as the MMWA has also resulted.[102] This apparent conflict in policy and legislation has spurred an

---

D. Carrington, *Perspectives on Dispute Resolution in the Twenty-First Century: Self-Deregulation, the "National Policy" of the Supreme Court*, 3 NEV. L.J. 259, 285 (2002) (discussing *Ting* case and stating AT&T was attempting to make it very difficult for anyone to effectively vindicate rights in arbitration forum).

99. *See, e.g.*, Comb v. PayPal, Inc., 218 F. Supp. 2d 1165 (N.D. Cal. 2002) (ruling arbitration clause between subscribers and electronic disbursement service procedurally and substantively unconscionable); Evans v. Matlock, No. M2001-02631-COA-R9-CV, 2002 Tenn. App. LEXIS 906, at *6 (Tenn. Ct. App. Dec. 23, 2002) (holding arbitration agreement between E-Bay online auction website and its users does not apply to controversies between users).

100. *See* MONT. CODE ANN. § 27-5-14(4) (1995) (declaring arbitration clause unenforceable unless notice that contract is subject to arbitration is typed in underlined capital letters on first page of contract). The Montana statute, however, was held preempted by the FAA. *See, e.g.*, Doctor's Assoc., Inc. v. Casarott, 517 U.S. 681, 683 (1996) (refusing to enforce Mont. Code Ann. § 27-5-114(4) that made enforceability of arbitration agreements conditional on compliance with the statute). *See also* Sternlight 2, *supra* note 29, at 840-41 (referring to unsuccessful legislative attempts to prohibit mandatory consumer and employee arbitration agreements).

101. *See* 12 V.S.A. § 5652(b) (1985) (requiring arbitration agreement to clearly state that signing agreement forecloses any court remedies concerning any dispute and that statement be displayed prominently). The Vermont statute, however, was held preempted by the FAA. *See, e.g.*, Joder Bldg. Corp. v. Lewis, 569 A.2d 471, 473 (Vt. 1989) (refusing to enforce Vermont statute 12 V.S.A. § 5652(b) that made enforceability of arbitration agreements conditional on compliance with the statute). *See also* Sternlight 2, *supra* note 29, at 840-41 (referring to unsuccessful legislative attempts to prohibit mandatory consumer and employee arbitration agreements).

102. *See* Sternlight 2, *supra* note 29, at 840-41 (stating that even federal legislation such as MMWA, that seems to clearly limit mandatory consumer arbitration, has been inconsistently interpreted). *See, e.g.*, Davis v. S. Energy Homes, 305 F.3d 1268, 1274 (11th Cir. 2002) (ruling Congress did not intend to bar binding arbitration agreements in language, legislative history, or underlying purposes of MMWA); Walton v. Rose Mobile Homes L.L.C., 298 F.3d 470 (5th Cir. 2002) (holding that MMWA does not preclude binding arbitration of claims pursuant to valid binding arbitration agreement, which courts must enforce pursuant to FAA and binding purchasers of mobile home arbitrate their claims). *But see* Wilson v. Waverlee Homes, Inc., 954 F. Supp. 1530 (M.D. Ala. 1997), *rev'd*, Davis v. S. Energy Homes, 305 F.3d 1268 (11th Cir. 2002) (holding binding arbitration clause for mobile homeowner claims asserted under MMWA unenforceable because conflicted with MMWA); Boyd v. Homes of Legend, Inc., 981 F. Supp. 1423 (M.D. Ala. 1997) (holding Congress intended MMWA to preclude binding arbitration of written warranties); In re Van Blarcum, 19 S.W.3d. 484 (Tex. App. 2000) (holding FAA superseded by MMWA's specific provisions prohibiting use of binding arbitration clauses in written warranties); Raesly v. Grand Housing, Inc., 105 F. Supp. 2d 562 (S.D. Miss. 2000) (denying motion to compel arbitration on claim for breach of written express warranty on mobile home).

outcry for reform.[103]

B2C transactions have evolved from traditional brick-and-mortar retailing to cross-border international shopping.[104] This raises new concerns over the resolution of disputes in such an environment.[105] Arbitration's ability to resolve international disputes is well-established[106] but such disputes were traditionally in the B2B context.[107] In contrast, the success of arbitration in B2C

103. *See, e.g.*, Sternlight 2, *supra* note 29, at 837-38 (discussing how commentators in legal academy and popular press have criticized mandatory arbitration); Alderman, *supra* note 16 (discussing how use of mandatory arbitration in consumer transactions precludes effective redress for consumers); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, SUP. CT. REV. 331, 363 (1996) (discussing problems with FAA and advocates non-contractualist approach to consumer arbitration). *But see* Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington & Haagan)*, 29 MCGEORGE L. REV. 195 (1998) (advocating arbitration, including consumer arbitration, should be contractual); Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695 (2001) (advocating unfair pre-dispute arbitration agreements are less prevalent than literature suggests and even unfair arbitration clauses may be beneficial to parties).

104. *See* Stewart & Matthews, *supra* note 1, at 1111 (stating that especially in areas with large consumer markets, such as India, where number of people online is expected to reach 50 million by 2004, revenue generated by B2C commerce may approach that of B2B commerce). *See also* Commission Press Release IP/01/1423, *supra* note 2 (indicating reasons for increased consumer cross-border transactions); Christopher William Pappas, *Comparative U.S. & E.U. Approaches to E-Commerce Regulation: Jurisdiction, Electronic Contracts, Electronic Signatures and Taxation*, 31 DENV. J. INT'L L. & POL'Y 325, 325 (2002) (stating that consumers are no longer restricted to products available in one store, one town, or one country because Internet transcends boundaries and is accessible anywhere in world).

105. *See* Martin, *supra* note 8, at 130-31 (discussing importance of developing online remedy to e-commerce disputes involving consumers). There exists a great potential for defrauding cross-border consumers, and because of little regulation of the electronic commercial medium, a substantial governmental interest in protecting the rights of its citizens is justified. *Id.* The risks are further magnified by the potential that parties to the dispute are in different countries. *Id. See also* William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L L. 805, 820 (1999) [hereinafter Park 2] (suggesting international arbitration statute for commercial parties that removes consumer and employment arbitration). Explicitly excluding such contracts from the statute's scope would reduce the conflict that has arisen abroad when international arbitration statutes were not clear about their coverage. *Id.* at 821.

106. *See* GOLDBERG ET AL., *supra* note 18, at 233 (stating arbitration was used as early as thirteenth century by English merchants who preferred to have disputes resolved according to own customs rather than public law). *See also* Stewart & Matthews, *supra* note 1, at 1112 (pointing out international arbitration of B2B disputes developed early in history of global trade). *See also* BORN 1, *supra* note 4, at 7-11 (discussing advantages of international arbitration such as neutral decision-maker, results in agreement to settle dispute that is enforceable by treaty, procedural informalities, less discovery, more confidentiality, and prompt and efficient means of dispute resolution).

107. *See* BORN 1, *supra* note 4, at 7 (stating popularity of arbitration as means for resolving international commercial disputes has increased significantly over past several

cross-border claims is largely untested.[108]

1. Consumers' Needs Are Different Than Those of Business

Arbitration traditionally addressed the drawbacks of litigation to business parties.[109] It offered alternatives such as expert decision-making,[110] procedural simplicity and flexibility,[111] final-

---

decades and citing International Chamber of Commerce ("ICC") statistics demonstrating increase). *See also* Biukovic, *supra* note 88, at 319 (stating that international commercial arbitration has resolved disputes arising from commercial agreements such as sales of goods, transportation agreements, distributorship and agency agreements, construction contracts, joint ventures, licensing, patents, and technology transfers); Stewart & Matthews *supra* note 1, at 1112-13 (stating that when parties to international business transactions had disputes, at least one of them had to subject itself to laws and jurisdiction of foreign courts and preference developed for arbitration as way to avoid parochial nature of national courts). The treaties and conventions that resulted allowed enforcement of international arbitration awards and demonstrated a preference for arbitration. *Id.*

108. *See* Stewart & Matthews, *supra* note 1, at 1113 (stating that before Internet international B2C commerce was rare). International B2C disputes are governed by a patchwork of national laws, and it is difficult for consumers and businesses to predict which law will govern the transaction. *Id.* The concern over B2C dispute resolution prompted efforts by governments to discover a solution. *See, e.g.*, Martin, *supra* note 8, at 153-54 (discussing U.S. and E.U. endorsement of ADR or Online Dispute Resolution ("ODR") for resolution of B2C disputes). The FTC has instituted public workshops to explore the current state of ADR in the online community. *Id.* at 154; Cheri M. Ganeles, *Cybermediation: A New Twist on an Old Concept*, 12 ALB. L.J. SCI. & TECH. 715, 740-44 (2002) (discussing recent attempts at online arbitration services).

109. *See, e.g.*, Schwartz, *supra* note 16, at 80 (stating FAA was drafted to address three "evils" of litigation from vantage point of "businessmen": delay, expense, and lack of business expertise). A fourth core purpose, that arbitration served as a means of enforcing group discipline within business organizations was added by commentators shortly after the FAA's enactment. *Id.* The failure of litigation to reach a just decision when measured by the standards of the business world resulted from the judicial system's unfamiliarity with business practice or the unsuitability of general principles of law for resolving commercial disputes. *Id.* Business organizations included such groups as trade associations and merchantile exchanges. *Id. See also* BORN 1, *supra* note 4, at 7-10 (discussing advantages of arbitration to international commercial parties); Stewart & Matthews *supra* note 1, at 1112-13 (stating that when parties to international business transactions had disputes, at least one of them had to subject itself to laws and jurisdiction of foreign courts and preference developed for arbitration as way to avoid parochial nature of national courts).

110. *See* BORN 2, *supra* note 90, at 4 (discussing that parties can select court with significant commercial or other expertise relevant to transaction). The agreement can also provide for appointment of arbitrators with particular qualifications or the parties can make the appointments themselves. *Id. See also* PUBLIC CITIZEN, *supra* note 20, at 59-60 (stating businesses would rather have disagreements decided by experts chosen for their experience). One of the biggest disadvantages of litigation, especially in complex commercial cases, is that a judge and jury may not have the knowledge or understanding to grasp the dispute. *Id.* To compensate, expert witnesses and reams of complicated diagrams and calculations are needed to explain the issues, and even then the average

ity,[112] confidentiality,[113] and cost-savings.[114] Arbitration also ad-

juror may not fully understand the dispute. *Id.*; Biukovic, *supra* note 88, at 344 (stating that it has always been emphasized that one of greatest advantages of arbitration over litigation is that parties can opt for individuals who are highly experienced and knowledgeable in subject matter of their dispute); GOLDBERG ET AL., *supra* note 18 at 234 (stating that expertise of decision-maker is one theoretical advantage of arbitration over court adjudication).

111. *See, e.g.*, BORN 2, *supra* note 90, at 8-9 (stating parties have greater freedom to agree on neutral and appropriate procedural rules, realistic timetables, and expert and neutral decision-makers). *See* PUBLIC CITIZEN, *supra* note 20 (noting procedural flexibility allows quick dispute resolution in private and informal atmosphere that makes business people feel comfortable). *See also* Schwartz, *supra* note 16, at 60 (noting arbitration generally eliminates pretrial motion and discovery practice, and informality of arbitration means less time preparing for hearings and presenting evidence). Particular industries can also choose proceedings commensurate with members' needs. *See, e.g.*, AAA, Construction Industry Arbitration Rules and Mediation Procedures, *at* http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\ .\ .\focusArea\construction\AAA047current.htm (revised July 1, 2003) [hereinafter AAA Construction Rules] (establishing arbitration rules for construction disputes). Many industries also use standard arbitration clauses and rules in their documents. *See, e.g.*, American Institute of Architects ("AIA") Document A201, § 4.6.2 (1997) (on file with author) (containing standard arbitration agreements that incorporate AAA Construction Industry Rules).

112. *See* BORN 2, *supra* note 90, at 2 (stating arbitration produces definitive and binding award generally capable of enforcement through national court proceedings). *See also* PUBLIC CITIZEN, *supra* note 20 (recognizing arbitration eliminates protracted appellate litigation); GOLDBERG ET AL., *supra* note 18, at 234 (discussing that courts will nearly always respect provision that arbitrator's decision is final and binding, which discourages appeals to courts and make provisions for finality meaningful).

113. *See, e.g.*, BORN 1, *supra* note 4, at 13 (noting arbitral hearings are usually closed to press and public, and submissions and awards generally remain confidential). *See also* Schwartz, *supra* note 16, at 61 (recognizing that papers filed with arbitrators are not part of any public record; proceedings take place in private offices rather than in public courtrooms; and they tend to be less interesting to media); Biukovic, *supra* note 88, at 334 (stating that as private and consensual institution, arbitration is option for parties who do not want their proceedings to be open to public as they would be in standard civil litigation). Depending upon national laws, however, the right to privacy in arbitration may not be automatic, and parties may need to expressly contract for it. *Id.* at 334-35.

114. *See* BORN 2, *supra* note 90, at 8-9 (stating that even though costs in international commercial arbitration are rarely cheap because parties have to pay arbitrator fees and institution fees, logistical expenses of renting hearing rooms, travel to arbitration situs, lodging, etc., additional costs of arbitration can pale in comparison to legal costs in parallel or multiplicitous proceedings in national courts). Costly, scorched-earth discovery and other procedural tactics, such as those of the United States, are also not usually found in arbitration. *Id.* at 9. Even though complex arbitration cases can rival the costs of litigation, they can still be cheaper, especially where jury awards are involved. *See also*, Schwartz, *supra* note 16, at 60-61 (stating there is perception that arbitrators give smaller awards than juries because corporate defendants may believe they are likely to get sympathy from arbitrators, since arbitrators are usually drawn from the business community); GOLDBERG ET AL., *supra* note 18, at 234 (stating simplified

dressed the unique concerns of cross-border commercial transactions, such as forum selection and litigation bias.[115] Defenders of binding pre-dispute arbitration in the consumer context assert that arbitration may similarly favor individual claimants, the public, and the companies that use such agreements.[116] In theory, this results from the reduced litigation costs that plague businesses in disputes with consumers.[117] Scholars argue it is questionable whether any of these advantages actually transfer to consumers[118] and argue arbitral informalities may actually be

---

procedures, absence of discovery, and lack of opportunity to appeal tend to reduce costs of dispute resolution as compared to litigation).

115. *See, e.g.*, BORN 2, *supra* note 90, at 2-3 (addressing that forum selection is important to international parties because it may offer one party favorable forum for resolution of future disputes, or at least preclude litigation in undesirable forum). It can also preclude parallel or multiplicitous litigation of the same dispute in several different forums. *Id.* at 4. *See also* Park, *supra* note 4, at 26 (stating concerns over litigation bias against foreigners may chill international transactions unless neutral alternatives to adversary's judicial system exist). Failed forum selection agreements can subject a party to unfamiliar procedures, a foreign language, and sometimes a judge in a country without a tradition of judicial independence. *Id.*; Biukovic, *supra* note 88, at 331 (stating international commercial arbitration is favored over litigation because it can be closely tailored to needs of parties and allow them to avoid uncertainties related to application of foreign laws with which they are unfamiliar and unpredictable outcome of litigation in foreign courts and under foreign legal procedures).

116. *See* Sternlight 2, *supra* note 29, at 839 (discussing position of defenders of mandatory arbitration in consumer context and stating that consumers, public, and companies who use mandatory arbitration all benefit); Drahozal, *supra* note 103, at 641 (suggesting that individuals may be better off agreeing even to one-sided arbitration clauses instead of retaining their right to go to court if resulting cost savings are passed on to consumer through reductions in price of goods and services). *But see* Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 IOWA J. CORP. L. 331, 360 (1996) (stating that contracting parties need to be bound to their arbitration clauses to make arbitration cost efficient).

117. *See* Sternlight 2, *supra* note 29, at 839 (discussing position of defenders of mandatory arbitration in consumer context and stating that consumers, public, and companies who use mandatory arbitration all benefit); Drahozal, *supra* note 103, at 756 (stating that unfair provisions, on their face, disadvantage individual at expense of corporation, but if corporation's benefit from arbitration exceeds individual's loss, corporation compensates individual for disadvantage suffered and both parties are made better off); Brafford, *supra* note 116, at 355 (stating that consumer benefits from time and money savings provided by standardized contract, as well as litigation costs saved by businesses from using arbitration agreement, and if transaction costs increased for business, business would pass those costs on to consumer).

118. *See* Schwartz, *supra* note 16, at 60 (stating disputes involving fraud, negligence, and consumer contract actions do not necessarily require experts to decipher dispute, and can be decided by juries under "reasonable person" standard). Protracted litigation is also not the norm, as courts have developed techniques that involve the judge using his or her authority to set early discovery deadlines and early, firm trial dates. *Id.* *See also* Llewellyn Joseph Gibbons, *Rusticum Judicium? Private "Courts" Enforc-*

detrimental.[119]

2. Criticisms of U.S. Consumer Arbitration

Consumer arbitration and the controversy surrounding it are not as prevalent outside the United States.[120] Competing national policies regarding consumer arbitration, however, greatly affect how consumers and companies interact in cross-border commerce.[121] The following highlight concerns about arbitration's ability to deal with consumer cross-border complaints.

---

ing Private Law and Public Rights: Regulating Virtual Arbitration in Cyberspace, 24 OHIO N.U.L. REV. 769, 775 (1998) [hereinafter Gibbons 2] (advocating consumer arbitration requires abandoning elegant simplicity of traditional commercial arbitration and requiring it to develop something akin to due process and fair play); Biukovic, *supra* note 88, at 338 (stating that for individuals and for disputes involving small amounts, international commercial arbitration is not as affordable as ADR). *But see* Drahozal, *supra* note 103 (advocating consumer arbitration critics' typical arguments about unfairness of consumer arbitration are misplaced).

119. *See* BORN 2, *supra* note 90, at 9 (stating lack of detailed procedural code or decision-maker with direct coercive authority may allow party misconduct and create opportunities for greater range of procedural disputes); PUBLIC CITIZEN, *supra* note 20, at 65 (stating consumers are unlikely to benefit from informal discovery process where evidentiary burden shifts to consumer). The claimant is more likely than the defendant to need information obtainable only through formal discovery, and saving legal fees and expenses through reduced discovery is not a tradeoff that a consumer or employee claimant is likely to find appealing. *Id.*; Schwartz, *supra* note 16, at 61 (stating plaintiff has burden of production of evidence, much of which defendant may well possess, which sharply curtails plaintiff's ability to develop evidence through informal investigation rather than discovery).

120. *See* Sternlight 2, *supra* note 29, at 831 (stating companies rarely employ mandatory consumer arbitration outside United States and noting no evidence that practice of mandatory private arbitration exists outside U.S. borders); Overby, *supra* note 9, at 1280-81 (stating that pro-FAA case law from Supreme Court coupled with judicial interpretations of State contract law regarding fundamental fairness and consent that often disfavor consumers has resulted in presumption that favors enforcement of arbitration clauses in consumer contracts). Europe, in contrast, has a somewhat opposite attitude toward enforcement of mandatory arbitration clauses in standard form contracts because of the Consumer Directive. *Id.* at 1281. *See also* Drahozal & Friel, *supra* note 8, at 393 (summarizing differences between U.S. and E.U. mandatory consumer arbitration).

121. *See, e.g.*, Ponte, *supra* note 3 (suggesting revision of current Consumer Protocol to meet unique needs and challenges of online B2C environment); Drahozal & Friel, *supra* note 8, at 384 (stating that Internet merchants vary standard form contracts and dispute resolution procedures based on differing regulatory schemes and legal rules); Martin, *supra* note 8, at 130-31 (advocating various methods of online ADR); Stewart & Matthews, *supra* note 1 (concluding that there is no uniform system in place for international online B2C disputes and development of independent, self-regulating, and enforceable online process would provide stability needed for cross-border B2C commerce to flourish).

a. Arbitration Agreements are Contracts of Adhesion

Arbitration advocates assume that the agreement to arbitrate is voluntary[122] but in today's market this assumption is not always correct.[123] Many consumer contracts contain binding arbitration agreements.[124] Such agreements are subject to the same enforceability requirements as standard contracts.[125] Therefore, contract defenses such as fraud, duress, or unconscionability, may invalidate such agreements.[126] Some scholars

---

122. *See* BORN 1, *supra* note 4, at 155 (discussing presumptive validity of international arbitration agreements). *See also* Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1170-71 (N.D. Cal. 2002) (quoting Ajida Tech., Inc. v. Roos Instruments, Inc., 104 Cal. Rptr. 2d 686 (Cal. Dist. Ct. App. 2001) (holding party cannot be required to submit to arbitration any dispute which he has not agreed so to submit).

123. *See* Schwartz, *supra* note 16, at 107-08 (stating consumer transactions typically involve form contracts and unequal bargaining power). It is presumed that the consumer is free to shop around for better terms, but when all the businesses in the same market impose similar terms on the consumer, shopping for more favorable contract terms is impossible. *Id.* at 108. *See also* Alderman, *supra* note 16, at 1247-48 (noting terms of agreement are typically set forth in standard form contracts and terms offered on a take-it-or-leave it basis and such contracts of adhesion bear little resemblance to consensual agreements); Ponte, *supra* note 3, at 449-50 (discussing adhesion contract concerns in development of consumer protocols for online dispute resolution efforts). *But see* Brafford, *supra* note 116 (proposing that common arguments that consumer arbitration is unfair from contractual standpoint are incorrect).

124. *See generally* Schwartz, *supra* note 16, at 56 (stating pre-dispute arbitration clauses are typical of the kinds of form terms in adhesion contracts that have long troubled courts and commentators). Pre-dispute arbitration clauses make the typical problems found in adhesion contracts worse. *Id.* at 59. Post-dispute arbitration agreements are generally considered acceptable. *See, e.g.*, Joder Bldg. Corp. v. Lewis, 569 A.2d 471, 472 (Vt. 1989) (involving homeowner and contractor's claim to arbitrate contract dispute after dispute arose). *See generally* Schwartz, *supra* note 16, at 105 (stating that arbitration of existing disputes is similar to settlement, where private agreement allows parties to reach binding resolution of their dispute out of court).

125. *See* 9 U.S.C. § 2 (2000) (stating written arbitration provision shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract). *See, e.g.*, Doctor's Assoc., Inc. v. Casarott, 517 U.S. 681, 687 (1996) (holding contract defenses do not contravene section 2 of FAA); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483-84 (1989); Shearson/Amer. Express Inc. v. McMahon, 482 U.S. 220, 226 (1987). Federal courts look to State law when addressing issues of contract validity and enforceability. *See, e.g.*, Lozano v. AT&T Wireless, 216 F. Supp. 2d 1071, 1074 (C.D. Cal. 2002) (holding that federal courts look to State law to determine issues of contract validity and enforceability).

126. *See* Blake v. Ecker, 113 Cal. Rptr. 2d 422 (Cal. Ct. App. 2001) (describing unconscionability as having both procedural and substantive components, where procedural component involves unequal bargaining positions and hidden terms common to adhesion contracts.) *See also* Ex parte Thicklin, 824 So. 2d 723, 731 (Ala. 2002) (holding procedural unconscionability can include deception or refusal to bargain over contract terms, today often analyzed in terms of whether imposed-upon party had meaningful choice about whether and how to enter into transaction). *See also* Comb v. PayPal,

contend that consumer arbitration agreements should be per se unconscionable adhesion contracts, and therefore unenforceable.[127] Courts, however, treat such agreements as presumptively valid even where there is a significant difference in bargaining power.[128]

b. Repeat-Players Fare Better in Arbitration

Some commentators acknowledge the difference between consumers and parties that frequently arbitrate ("repeat-players").[129] Evidence that repeat-players have an advantage in arbi-

---

Inc., 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002) (holding substantive unconscionability concerns fairness and exists when overly harsh or one-sided results "shock the conscience").

127. *See* Schwartz, *supra* note 16, at 55 (discussing typical definition of adhesion contracts). Adhesion contracts are generally understood as: (1) standardized form documents (2) drafted by, or on behalf of, one party which (3) participates routinely in similar transactions and (4) presents the form to the other party on a take-it-or-leave-it basis; (5) the adhering party enters into few transactions of the type in question, and (6) the adhering party signs the form after dickering over the few terms, if any, that are open to bargaining. *Id. See also* Robson v. E.M.C. Ins. Cos., 785 A.2d 507, 510 (P.A. Super. Ct. 2001) (defining adhesion contract as standard form contract prepared by one party, to be signed by party in weaker position, usually consumers, who have little choice about terms); Hughes Training Inc. v. Cook, 254 F.3d 588, 594 (5th Cir. 2001) (holding adhesion contract is standardized contract which, imposed and drafted by party of superior bargaining strength, relegates to subscribing party only opportunity to adhere to contract or reject it). *But see Lozano*, 216 F. Supp. 2d at 1074 (holding both procedural and substantive unconscionability must be present for unconscionability). If an agreement is procedurally unconscionable, it may still be enforceable if the substantive terms are reasonable. *Id.* For example, an arbitration clause that prevents a party from seeking punitive damages or that prevents class actions is not substantively unconscionable. *Id.* at 1075; *Thicklin*, 824 So. 2d at 731 (holding substantive unconscionability can include terms that impair integrity of bargaining process or otherwise contravene public interest or public policy and terms that attempt to impermissibly alter fundamental duties otherwise imposed by law, fine-print terms or provisions that seek to negate reasonable expectations of non-drafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of transaction); *Comb*, 218 F.Supp. 2d at 1173-75 (holding substantive unconscionability existed in case where mutuality was lacking, there was no right to consolidate claims, there were high arbitration costs for customers, and any litigation to secure relief pending arbitration was required to be brought in inconvenient forum).

128. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (holding mere inequality in bargaining power is not sufficient reason to hold that arbitration agreements are never enforceable); *Hughes Training Inc.*, 254 F.3d at 593 (holding there is nothing per se unconscionable about arbitration agreements). *See also* Drahozal & Friel, *supra* note 8, at 374 (discussing enforceability of pre-dispute arbitration agreements); Sternlight 2, *supra* note 29, at 835 (discussing U.S. policy enforcing pre-dispute arbitration agreements with consumers and employees).

129. *See* Cole 1, *supra* note 31, at 12 (suggesting parties should be separated into two groups based on how frequently they are subjected to arbitration). The first group

tration tends to show that business parties may fare better than consumers.[130] Arbitration also limits a consumer's ability to utilize the legal system, which would normally provide some offset to a repeat-players' advantage.[131]

c. Incorrect Application of Statutory Protections Threatens Consumer Due Process

Arbitrators are not required to decide according to estab-

---

is traditional arbitration practiced among repeat players such as merchants and labor unions. *Id.* The second group is modern arbitration that is practiced between repeat players and one-shot players, such as employees and consumers. *Id. See also* Sarah Rudolph Cole, *Uniform Arbitration: One Size Fits All Does Not Fit*, 16 OHIO ST. J. DISP. RES. 759 (2001) (identifying and discussing cases and commentary supportive of theory of separating consumers and repeat players). *See also* Schwartz, *supra* note 16, at 60-61 (suggesting that repeat players may have advantage over consumers and plaintiff's attorneys in arbitration cases); PUBLIC CITIZEN, *supra* note 20, at 74 (stating there is tremendous difference between arbitration agreements that bind "one-shot" litigants and those entered into by more sophisticated parties).

130. *See* Schwartz, *supra* note 16, at 60-61 (citing study determining employees recover lower proportion of claims in repeat player cases than non-repeat player cases). Businesses also take advantage of the arbitrator's desire to build its track record of decisions favorable to business and favorable decisions provide a potential future source of business for the arbitration community. *Id.* at 61. *See also* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION, INTERNATIONALIZATION 7, 58 (1992) (stating AAA received over USD 32 million in fees in 1990, excluding fees paid to arbitrators themselves); Sabin, *supra* note 89, at 1344 (stating claims that arbitrators pander to repeat players are supported by recent studies); Kelly, *supra* note 16 (stating ABA complains certain types of matters favored repeat defendants, and that frequent arbitrations allow defendants to develop defenses and strategies); Alderman, *supra* note 16, at 1253-58 (discussing benefits of arbitration to repeat-players). *See, e.g.*, Lisa Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108, 113-16 (1996) (finding that in study of AAA employment arbitrations repeat-players achieved better results than those who were not repeat-players); Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 58-61 (1999) (referring to studies in employment arbitration and litigation context that attempt to determine if repeat-players have advantage).

131. *See* Alderman, *supra* note 16, at 1255-56 (stating mandatory arbitration allows business parties to avoid court system that gives consumers some ability to offset repeat-player advantage). Devices such as class action suits allow consumers to increase financial incentives of a lawsuit and specialized legal organizations can offer expertise and resources to individual players and help determine which claims should be appealed to establish the best precedent. *Id.* at 1254-55. Consumers may also have access to attorneys that specialize in consumer claims due to fee-generating statutes and substantial damage awards. *Id.* at 1255. Small claims courts also allow consumers access to simplified procedures and rules that minimize attorney involvement and keep costs down. *Id. See also* Menkel-Meadow, *supra* note 130, at 58-61 (referring to studies in employment arbitration and litigation context that attempt to determine if repeat-players have advantage).

lished principles of law.[132] Even a clear mistake of law or a misapplication of the law to the facts is not grounds to vacate an arbitration award.[133] According to the U.S. Supreme Court, an arbitrator's failure to properly apply the law in statutory claims is not a sufficient cause for concern.[134]

For an award to be overturned, it must be found that the arbitrators manifestly disregarded the law.[135] Critics note, how-

132. *See* Carrington & Haagen, *supra* note 103, at 344-45 (stating arbitration is often conducted by nonlawyers from organizations founded and supported by merchants and traders, and even if qualified to decide legal issues there is no duty to resolve dispute in compliance with legal rights). *See also* Carrington, *supra* note 98, at 283 (stating arbitrators need not be lawyers and are not required to know or enforce law). *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 436 (1953), *rev'd on other grounds*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (holding errors in interpretation of law are not enough to vacate arbitrator's award, but manifest disregard of law would be).

133. *See, e.g.*, *Wilko*, 346 U.S. at 436 (holding errors of law, unless manifest disregard of law, are not enough to vacate arbitrator's award); United Paperworkers Int'l Union v. Misco, Inc. 484 U.S. 29, 36 (1987) (holding courts are not authorized to reconsider merits of award even though parties may allege award rests on errors of fact or misinterpretation of collective bargaining contract). *See also* DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 822 (2d Cir. 1997) (upholding arbitrator's award in Age Discrimination in Employment Act ("ADEA") action even where clear arbitrators did not apply statutory law correctly). In *DiRussa*, the Second Circuit agreed with the District Court that the governing ADEA mandated the award of attorney's fees to successful claimants such as the plaintiff. *Id.* The Second Circuit, however, found that the plaintiff could not prove he clearly communicated the mandatory requirements of the ADEA to the arbitrators. *Id.* Therefore, the court could not infer that the arbitrators consciously disregarded the ADEA's fee provisions. *Id.* at 823; Carrington, *supra* note 98, at 283 (stating that arbitrators do not need to know or enforce the law); Sabin, *supra* note 89, at 1350 (noting vacation for disregarding applicable law is "virtually precluded").

134. *See* Green Tree Financial Corp-Alabama v. Randolph, 531 U.S. 79, 89-90 (2000) (holding claims resting on suspicion arbitration weakens protections afforded in substantive law to would-be complainants are rejected by U.S. Supreme Court); Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 232 (1987) (holding there is no reason to assume arbitrators will not follow law, but even if they did, court review is sufficient to ensure statutory compliance).

135. *See DiRussa*, 121 F.3d at 821 (defining manifest disregard standard). The following demonstrates manifest disregard of the law: (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case. *Id. See also* Schwartz, *supra* note 16, at 89-90 (discussing manifest disregard standard set out by U.S. Supreme Court in *Wilko*). *See, e.g.*, Goldman v. Architectural Iron Co., 306 F.3d 1214 (2d Cir. 2002) (holding that homeowner could not demonstrate arbitrator manifestly disregarded law). In *Goldman*, a homeowner sought to vacate an arbitration award made in favor of a contractor who installed a conservatory atop her house. *Id.* The decisive issue of law in the case was whether the Home Improvement Law allowed an unlicensed contractor to enforce a home improvement contract against a homeowner who also acted as the general contractor on the project. *Id.* at 1217. Since there

ever, that vacation for manifest disregard is rare.[136] It is difficult to prove an arbitrator intentionally disregarded applicable law when no explanation for the award is required.[137]

d. Arbitration is Too Expensive for Consumers

One of the most touted benefits of arbitration is its reduced

---

was no well-defined, explicit, and clearly applicable principle, the court ruled that the resolution of the controversy in arbitration required application of "an unclear rule of law to a complex factual situation," and therefore the arbitral decision could not have been in manifest disregard of the law. *Id.*

136. *See* Sabin, *supra* note 89, at 1350 (noting vacation for manifest disregard is "virtually precluded"). *See also* Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234, 240 (1st Cir. 1995) (holding where arbitrators do not explain reasons justifying their award it is nearly impossible for court to determine whether they acted in disregard of law). Even though nonstatutory vacatur is rare, it is not impossible. *See, e.g.*, Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998) (reversing refusal to vacate arbitration award in ADEA claim because arbitrators ignored law or evidence or both); Montes v. Shearson Lehman Bros, Inc., 128 F.3d 1456, 1464 (11th Cir. 1997) (reversing confirmation of arbitration award because arbitration board was urged to deliberately disregard law, and there was lack of support in facts for ruling and no indication in record or ruling to indicate that arbitrators rejected plea to disregard law).

137. *See, e.g.*, Halligan v. Piper Jaffray, 148 F.3d 197, 204 (2d Cir. 1998) (recognizing Second Circuit repeatedly held arbitrators have no obligation to explain award). However, the court held that when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account. *Id.*; Sargent v. Paine Webber Jackson & Curtis, Inc., 882 F.2d 529, 532 (D.C. Cir. 1989) (holding explanation requirement would unjustifiably undermine speed and thrift sought to be obtained by arbitration). This does not apply in cases where the parties agree that the arbitrator will explain the award, but such a requirement is the exception, and not the rule, and the parties must make sure the requirement is specified in the arbitration agreement. *Id.*; Stehli v. Action Custom Homes, Inc., 761 N.E.2d 129, 133 (Ohio Ct. App. 2001) (upholding arbitration award in favor of homeowners in action against contractor because contract did not specify arbitrator had to explain award). The court held the arbitrator was not required to provide a written explanation of the award, even when both parties requested one after the award was rendered because the contract did not specify that that arbitrator was to explain the award. *Id.* The parties claimed that Rule 42 of the Construction Industry Arbitration Rules of the American Arbitration Association required that the arbitrator provide an explanation upon written request by the parties, but the court found that under the plain language of the rule, an arbitrator is not required to provide a written explanation of the award unless all the parties made such a request *prior* to the appointment of the arbitrator. *Id. See also* Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 450 (1998) (stating that value of nonstatutory vacatur is illusory because arbitrators are not required to issue formal opinion even when recognized as ground for vacatur and that absence of substantive reasoned awards revealing manner in which arbitrators have decided cases before them has been major factor in effectively insulating challenged arbitration awards from vacatur on basis of non-statutory grounds).

cost compared to litigation.[138] Recent evidence shows, however, that arbitration may not provide the cost savings parties typically expect.[139] Consumer disputes generally involve small dollar amounts[140] and consumers may choose not to pursue claims when the cost of seeking redress is greater than the amount in dispute.[141] When adding up administrative costs and arbitrator and attorney's fees, arbitration costs may approach thousands of dollars in some cases.[142] This is typically a substantial cost differ-

---

138. *See* Alderman, *supra* note 16, at 1249 (stating one argument supporting policy favoring mandatory arbitration is that arbitration is less costly than traditional litigation). *See also* PUBLIC CITIZEN, *supra* note 20, at 1 (quoting Ed Anderson of NAF who stated arbitration can save parties 70-80% of cost of litigating these cases); Hearing Transcript, *Fairness and Voluntary Arbitration Act*, House Judiciary Subcommittee on Commercial and Administrative Law (June 8, 2000) (stating speed and affordability of arbitration are perhaps its most discussed benefits); AAA Consumer Rules, *supra* note 44 (stating arbitration is usually faster and cheaper than going to court).

139. *See, e.g.*, PUBLIC CITIZEN, *supra* note 20, at 1 (stating cost to plaintiff of initiating arbitration is almost always higher than cost of instituting lawsuit). The report compared the forum costs of arbitration to court fees and determined that arbitration costs can be up to 5,000% higher. *Id. See also* Kelly, *supra* note 16 (stating arbitration participants are not convinced that in certain cases arbitration is cheaper or shorter than litigation and that increased hearings and procedures has further reduced cost savings of arbitration). Another potential problem is that consumers do not know up front how much the arbitration will cost. *See, e.g.*, Camacho v. Holiday Homes, Inc., 167 F. Supp. 2d 892, 897 n.4 (W.D. Va. 2001) (indicating it is impossible to establish exact amount consumer would have to pay because arbitrator sets amount after arbitration is initiated).

140. *See* Alderman, *supra* note 16, at 1250 (discussing costs of arbitration in consumer cases may greatly exceed litigation costs especially where small disputes would normally be eligible for small claims court). Small claims court access may be available for less than USD 100 in many states. *Id.* Arbitration often involves substantial fees, and costs of USD 1,000 per day are not unusual. *Id. See also* Ponte, *supra* note 3, at 467-70 (explaining how online world has allowed participation by parties who cannot afford direct participation in many traditional markets, causing greater incidence of small transactions); Martin, *supra* note 8, at 132 (noting current median B2C transaction is valued at approximately USD 300).

141. *See* Ponte, *supra* note 3, at 469 (stating high transaction costs of dispute resolution can make it less likely victims will seek vindication of their rights). Low transaction value, combined with high transaction costs also means consumers victimized by unscrupulous or incompetent sellers are unlikely to devote the resources necessary to vindicate their rights. *Id.* at 470. *See also* Geraint Howells, *Litigation in the Consumer Interest*, 9 ILSA J. INT'L & COMP. L. 1, 7 (2002) (stating that consumers often have small claims but such claims can have significant impact on consumer welfare, especially for disadvantaged consumers who ironically are less likely to seek redress); Alderman, *supra* note 16, at 1250 (stating costs for arbitration may greatly exceed costs of litigation especially where small disputes that may be eligible for small claims court are involved).

142. *See, e.g.*, PUBLIC CITIZEN, *supra* note 20, at 5 (providing example where consumers had to pay high arbitration costs to have dispute addressed). A couple purchased new home under contract that contained a mandatory arbitration clause. *Id.*

ence between arbitration and adjudication, especially when a consumer could file a complaint in small claims court without the aid of counsel.[143] The cost disparity is especially true in international arbitrations, where arbitration fees and costs tend to be more expensive than domestic arbitrations.[144]

The cost associated with arbitration is frequently litigated in U.S. courts.[145] Courts have held that excessive arbitration costs

---

After finding numerous defects, they chose to make a claim against the seller, which eventually went to arbitration. *Id.* They paid an initial filing fee of USD 1,500 to cover AAA's administrative costs, and were required to advance USD 7,563.75 for the arbitrator's compensation. *Id.* USD 2,580 was later refunded when the hearing was completed one day earlier than anticipated. *Id.* These fees were in addition to the couple's attorney fees and expert consultant fees. *Id. See also* Alderman, *supra* note 16, at 1250 (stating participants in arbitration must pay fee for process itself as well as daily fee to arbitrator and costs in excess of USD 1,000 are not unusual).

143. *See, e.g.*, PUBLIC CITIZEN, *supra* note 20 (comparing costs of litigation and costs of arbitration for four hypothetical cases). The report indicates that arbitration costs will likely always be higher than court costs because the expenses of a private legal system are so substantial. *Id.* at 2. The costs of administering a case in the Circuit Court of Cook County average USD 44.20, while the AAA's administrative cost per case averages 340.63. *Id.* The extra fees in arbitration can also be substantial, such as issuing subpoenas, discovery requests, and the use of hearing rooms. *Id.* Such fees are not charged if the dispute went to court. *Id.* It should be noted that the Public Citizen report only compares forum costs, which do not include costs such as attorney's fees for adjudication. *Id.* at 42. *See also* Howells, *supra* note 141, at 18 (stating U.S. small claims courts typically have highly simplified procedures and no need for representation and in some states there is even prohibition on use of lawyers in small claims courts). *See, e.g.*, Mendez v. Palm Harbor Homes, 45 P.3d 594, 604-05 (Wash. Ct. App. 2002) (holding arbitration provision of sales contract with mobile home purchaser unenforceable because cost prohibitive where USD 2,000 filing fee, requirement for three arbitrators, and purchaser's desperate economic status was cost prohibitive, considering amount in dispute was only USD 1,500 and cost of court filing fee was only USD 110).

144. *See* BORN 2, *supra* note 90, at 8 (discussing that cost of international arbitration is seldom cheap and parties have to pay arbitrator fees and usually arbitral institution as well). Logistical expenses such as hearing room rental, travel to the arbitral situs, and lodging are also incurred. *Id. See also* BORN 1, *supra* note 4, at 911 (stating arbitral tribunal may allocate costs at conclusion of proceedings, but this is not guaranteed and may depend on factors such as express grant of such costs in agreement, differing legal rules at arbitral situs regarding allocation of legal fees, and arbitrator discretion). Statutory provisions in national substantive laws may also apply. *Id.*

145. *See, e.g.*, Green Tree Financial Corp-Alabama v. Randolph, 531 U.S. 79, 89-90 (2000) (holding existence of large arbitration costs could preclude litigant from effectively vindicating federal statutory rights in arbitral forum); Camacho v. Holiday Homes, Inc., 167 F. Supp. 2d 892, 897 (W.D. Va. 2001) (holding arbitration clause in contract for purchase of manufactured home was unenforceable because arbitral forum was financially inaccessible to purchaser and prevented vindication of statutory rights under TILA); Mendez v. Palm Harbor Homes, 45 P.3d 594 (Wash. Ct. App. 2002) (declining to compel arbitration of mobile homeowner's claim because filing and administrative costs of AAA arbitration would be prohibitively high).

may render an agreement unenforceable,[146] and the U.S. Supreme Court decision in *Green Tree Financial Corp-Alabama v. Randolph*[147] supports this. In *Green Tree*, the Court considered a mobile home purchaser's claims that the seller could not force her to arbitrate her federal TILA and ECOA claims against the seller, even though her contract provided for arbitration.[148] She argued that the arbitration agreement was unenforceable because it failed to affirmatively protect her from potentially steep arbitration costs.[149] The Court reaffirmed that federal statutory claims may be arbitrated[150] and upheld the arbitration agreement.[151] The Court held that in this case, the "risk" that the buyer would be saddled with prohibitive costs was too speculative to justify invalidation of the arbitration agreement.[152] The burden of proving prohibitive costs, therefore, is on the consumer.[153] Arbitration filing fees and costs over USD 1,000 have been held prohibitive,[154] and a recent California appellate deci-

146. *See, e.g.*, Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569 (1st Dept. 1998) (holding cost of USD 4,000 for consumer arbitration through ICC was unconscionable given cost of dispute and USD 500 filing fee through AAA likely to be unconscionable as well). *See also Mendez*, 45 P.3d at 604-05 (holding arbitration provision of sales contract with mobile home purchaser unenforceable because cost prohibitive). The court found that the USD 2,000 filing fee, the requirement for three arbitrators, and the purchaser's desperate economic status was cost prohibitive, considering the amount in dispute was only USD 1,500 and the cost of the court filing fee was only USD 110. *Id.*

147. *Green Tree*, 531 U.S. at 90 (holding existence of large arbitration costs could preclude litigant from effectively vindicating federal statutory rights in arbitral forum).

148. *Id.* at 83.

149. *Id.* at 89.

150. *Id.* at 90.

151. *Id.* at 92.

152. *Id.* at 91.

153. *See* Schwartz, *supra* note 16, at 90 (discussing *Green Tree* decision and fact that burden of proving prohibitive costs is on consumer). *See, e.g.*, *Gateway 2000*, 676 N.Y.S.2d at 575 (holding arbitration agreement with consumers enforceable because consumers failed to prove prohibitive costs). The court remanded the *Gateway 2000* case to the trial court for substitution of an arbitrator and left an open question whether AAA costs were equally as oppressive as the ICC rules. *Id. See also* Walton v. Experian, No. 02 C 5067, 2003 WL 22110788, at *3 (N.D. Ill. Sept. 9, 2003) (holding consumer failed to meet burden necessary to invalidate arbitration agreement where she did not establish financial status or show how NAF arbitration fees of USD 310 were prohibitive).

154. *See Green Tree*, 531 U.S. at 92 (holding that costs may be prohibitive, but failing to reach that question because it determined that purchaser did not meet its burden of showing likelihood of prohibitive costs). *See also* Alderman, *supra* note 16, at 1252-53 (stating even after *Green Tree* decision, it is still unclear exactly how high costs must be to invalidate an arbitration agreement, whether decision of cost is objective or subjective, and whether rationale of *Green Tree* applies to situations other than assertion

sion indicates a pre-dispute arbitration clause may be unconscionable if the fees required to initiate the process are unaffordable, and the agreement fails to provide the consumer with an effective opportunity to seek a fee waiver.[155]

e. Limited Appeal and Review Threatens Due Process

Courts overturn awards in very limited circumstances[156] and

---

of federal statutory rights). *But see Gateway 2000*, 676 N.Y.S. 2d at 575 (holding cost of USD 4,000 for consumer arbitration through ICC was unconscionable given cost of dispute and that USD 500 filing fee and costs in excess of USD 1,000 through AAA likely to be unconscionable as well); Mendez v. Palm Harbor Homes, 45 P.3d 594, 604-05 (Wash. Ct. App. 2002) (holding arbitration provision of sales contract with mobile home purchaser unenforceable because USD 2,000 filing fee, requirement for three arbitrators, and purchaser's desperate economic status was cost prohibitive, considering amount in dispute was only USD 1,500 and cost of court filing fee was only USD 110).

155. *See, e.g.*, Gutierrez v. Autowest, Inc., No. A098704, 2003 Cal. App. LEXIS 1817, at *3 (Cal. Ct. App. Dec. 9, 2003) (holding that where consumer brought cause of action against car dealership alleging violation of California Vehicle Leasing Act, Cal. Civ. Code § 2985.7, pre-dispute arbitration clause may be unconscionable if fees to initiate process are unaffordable and agreement fails to provide waiver). The course further held that where the consumer sues under a state consumer statute providing unwaivable rights, as in the California statute, it is implied in the arbitration clause that unaffordable fees will not be allocated to the consumer at any point in the arbitration process. *Id.* In *Gutierrez*, the consumer claimed he was victimized by a "bait and switch" fraud that caused him to pay a higher lease price than that advertised. *Id.* at *4-5. The lease contract contained an arbitration clause that referred to the AAA rules. *Id.* at *5, n.3. Because the amount in controversy had a potential value of USD 500,000, the AAA Commercial Arbitration Rules applied, which would require plaintiffs to expend more than USD 10,000, exclusive of attorney's fees to arbitrate. *Id.* at *8. In this case, the consumer provided proof disclosing their monthly net income, expenses, and savings. *Id.* at *7. *See also* Kelly Cramer, *Consumer Arbitration Fees Must Be Affordable, California Court Says*, THE LEGAL INTELLIGENCER, Dec. 15, 2003, at 4 (discussing California appellate court decision in *Gutierrez* that held consumer contracts that require private arbitration instead of courts cannot burden plaintiff with expensive costs). *But see* Walton v. Experian, No. 02 C 5067, 2003 WL 22110788, at *3 (N.D. Ill. Sept. 9, 2003) (holding that NAF arbitration fees of USD 310 are "certainly not prohibitive").

156. *See* 9 U.S.C. § 10 (2000) (establishing four statutory grounds for vacation of arbitration awards). *See also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (ruling that section 2 of FAA creates body of federal substantive law applicable to any arbitration agreement under FAA which requires that questions of arbitrability be addressed with healthy regard for federal policy favoring arbitration and that any doubts concerning scope of arbitrable issues be resolved in favor of arbitration); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (holding that in construing arbitration agreement under FAA, parties' intentions control, but those intentions are generously construed as to issues of arbitrability); Volt Info. Sciences, Inc. v. Bd. of Trustees, 489 U.S. 468, 475-76 (1989) (holding due regard must be given to the federal policy favoring arbitration, and ambiguities as to scope of arbitration clause itself resolved in favor of arbitration); Hoffman v. Cargill Inc., 236 F.3d 458, 461 (8th Cir. 2001) (stating that courts tread lightly in reviewing

apply a standard of review recognized as "among the narrowest known to the law."[157] Once an award is confirmed in the courts, any dissatisfied party may appeal the award.[158] Upon review, the appellate court does not review an award on the merits,[159] and will not vacate it unless the award meets the statutory or limited common law grounds for vacation.[160]

The FAA provides four federal statutory grounds for vacation of arbitration awards, which courts interpret narrowly.[161] In

---

arbitration awards and review of arbitration awards is extremely narrow). *See also* GOLDBERG ET AL., *supra* note 18, at 235 (stating that both FAA and UAA make agreements to arbitrate specifically enforceable and there is strong public policy in favor of arbitration). Both federal and state courts will interpret agreements to arbitrate broadly and exceptions narrowly. *Id.*

157. *See* Sabin, *supra* note 89, at 1348-49 (stating that FAA provides four statutory grounds for vacation of arbitration award, but they are interpreted in "extraordinarily narrow" fashion favoring upholding arbitrator's award). There are also nonstatutory grounds for vacatur, such as manifest disregard of the law, but such vacatur is "virtually precluded." *Id.* at 1349-50. *See, e.g.*, ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1463 (10th Cir. 1995) (noting that court's power to overturn arbitrators' decision is among the narrowest known to law); Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir. 1960) (stating court's function in confirming or vacating arbitration award is severely limited).

158. *See* 9 U.S.C. § 9 (stating that if parties agree, court judgment shall be entered upon award made pursuant to arbitration and any party to arbitration may apply to court for order confirming award); 9 U.S.C. § 16 (stating when appeals may be taken under FAA); RUAA, *supra* note 29 (stating RUAA contains similar provision in section 22 that after party to arbitration proceeding receives notice of award, it may make court motion for order confirming award at which time court shall issue confirming order unless award is modified or corrected pursuant to sections 20 or 24 or is vacated pursuant to section 23). *See also* GOLDBERG ET AL., *supra* note 18, at 235-36 (discussing award confirmation process under FAA).

159. *See* United Paperworkers Int'l Union v. Misco, Inc. 484 U.S. 29, 36 (1987) (stating courts are not authorized to reconsider merits of award even though parties may allege that award rests on errors of fact or misinterpretation of contract); Flexible Mfg. Sys. Pty. Ltd. v. Super Products Corp., 86 F.3d 96, 100 (7th Cir. 1996) (holding parties are not entitled to reargue claims in proceeding to vacate arbitral award because such litigation defeats goal of arbitration to provide quick and cheap decision). *See also* Sabin, *supra* note 89, at 1347 (stating arbitration awards are not subject to general appellate review and FAA limits courts' ability to review merits of award even where erroneous decisions on facts or law exist).

160. *See* 9 U.S.C. § 10 (setting out four statutory standards for vacation under FAA); Wilko v. Swan, 346 U.S. 427, 439 (1953), *rev'd on other grounds*, Rodriguez de Quijas, 490 U.S. 477 (establishing "manifest disregard of the law" as grounds for vacation). *See also* Sabin, *supra* note 89, at 1348-50 (stating that in addition to four statutory reasons for vacation of arbitration award under FAA, federal circuits recognize several nanstatutory grounds such as "manifest disregard of the law," "public policy," "arbitrary and capricious," "completely irrational," or contrary to essence of arbitration agreement).

161. *See* 9 U.S.C. § 10 (2000). Section 10 states:

addition, the Supreme Court decision in *Wilko v. Swan*[162] established a "manifest disregard of the law" standard for vacation, now applied in all Circuits.[163] The standard involves more than

---

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id.; RUAA, *supra* note 31 (containing similar grounds for vacation in § 23). *See also* Sabin, *supra* note 89, at 1348-50 (discussing that grounds for review are interpreted in "extraordinarily narrow" fashion); MACNEIL ET AL., *supra* note 30, at 40:13 (stating pro-award stance of courts was preserved by Congress in FAA § 10 and is consistently nurtured by courts).

162. 346 U.S. 427, 436-37 (1953), *rev'd on other grounds*, Rodriguez de Quijas, 490 U.S. 477 (1989) (holding agreement to arbitrate unenforceable, but establishing "manifest disregard of the law" standard for overturning award).

163. *See, e.g.*, Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234, 239 (1st Cir. 1995) (recognizing "manifest disregard of the law" standard but declining to find it existed in this case); Willemijn Houdstermaatschappij, B.V. v. Standard Microsystems Corp., 103 F.3d 9, 13 (2d Cir. 1997) (holding that arbitrators had "barely colorable" justification for their decision that satisfies manifest disregard standard); United Transp. Union Local 1589 v. Suburban Transit Corp., 51 F.3d 376, 379 (3d Cir. 1995) (recognizing that only where there is manifest disregard of agreement, totally unsupported by principles of contract construction and law of shop, may reviewing court disturb award); Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31, 933 F.2d 225, 229 (4th Cir. 1991) (holding not only is arbitrator's fact finding and contract interpretation accorded great deference, but its interpretation of law is accorded deference as well and legal interpretation of arbitrator may only be overturned where in manifest disregard of law); Williams v. Cigna Fin. Advisors Inc., 197 F.3d 752, 762 (5th Cir. 1999) (holding that arbitrators did not act in manifest disregard of applicable law in rejecting ADEA claims); M & C Corp. v. Erwin Behr GmbH & Co., K.G., 87 F.3d 844, 851 (6th Cir. 1996) (recognizing manifest disregard doctrine applicable in domestic arbitration cases but denying its extension to violation of public policy necessary to deny confirmation of foreign arbitral award); Nat'l Wrecking Co. v. Int'l Bros. Of Teamsters, Local 731, 990 F.2d 957, 961 (7th Cir. 1993) (stating that when arbitrators demonstrate manifest disregard for applicable law courts will not enforce award); Lee v. Chica, 983 F.2d 883, 885 (8th Cir.), *cert. denied*, 510 U.S. 906 (1993) (recognizing arbitration award will not be set aside unless completely irrational or evidences manifest disregard for law); Barnes v. Logan, 122 F.3d 820, 821 (9th Cir. 1997) (recognizing award will not be set aside unless manifests complete disregard of law and must be confirmed if arbitrators even arguably construed or applied contract and acted within scope of their authority); Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631, 634 (10th Cir. 1988) (noting courts' recognition of manifest disregard standard and likening it to ensuring arbitra-

an error or misunderstanding of the law, clear or gross factual or legal errors, or the erroneous rejection of legal defenses.[164] A court must find that the arbitrator knew the law and intentionally ignored it.[165] Some Circuits have expanded the non-statutory standard to vacate awards that are "arbitrary and capricious," contrary to public policy, "completely irrational," or "fundamentally unfair."[166]

---

tor's decision relies on his interpretation of contract as contrasted with his own beliefs of fairness and justice); Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456, 1461 (11th Cir. 1997) (stating that for manifest disregard one must be conscious of law and deliberately ignore it); Kanuth v. Prescott, Ball & Turben, Inc., 949 F.2d 1175, 1182 (D.C. Cir. 1991) (holding panel did not manifestly disregard law where award stated that where questions of substantive law arose, panel looked to law of State of Ohio in reaching its determination).

164. *See, e.g.*, DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 821 (2d Cir. 1997) (requiring that arbitrators knew governing legal principle yet refused to apply it or ignored it altogether); Bowen v. Amoco Pipeline Co., 254 F.2d 925, 932 (10th Cir. 2001) (holding manifest disregard means that record shows arbitrators knew law and explicitly disregarded it); Flexible Mfg. Sys. Pty. Ltd. v. Super Products Corp., 86 F.3d 96, 100 (7th Cir. 1996) (holding that arbitrators mistake by erroneously rejecting valid, or even dispositive legal defense does not provide grounds for vacating award unless arbitrator deliberately disregarded what she knew to be law).

165. *See DiRussa*, 121 F.3d at 821 (stating "manifest disregard of the law" would exist where (1) arbitrators knew of governing legal principle yet refused to apply it or ignored it altogether, and (2) law ignored by arbitrators was well defined, explicit, and clearly applicable to case). *See, e.g.*, Goldman v. Architectural Iron Co., 306 F.3d 1214, 1217 (2d Cir. 2002) (holding resolution of controversy in arbitration required application of unclear rule of law to complex factual situation and therefore arbitral decision could not have been in "manifest disregard of the law"). *Goldman* involved a homeowner who sought to vacate an arbitration award made in favor of a contractor who installed a conservatory atop her house. *Id.* The decisive issue of law in the case was whether the Home Improvement Law allowed an unlicensed contractor to enforce a home improvement contract against a homeowner who also acted as the general contractor on the project. *Id.* at 1217.

166. *See* Sabin, *supra* note 89, at 1348-50 (stating that in addition to four statutory reasons for vacation of arbitration award under FAA, federal circuits recognize several nonstatutory grounds such as "manifest disregard of the law," "public policy," "arbitrary and capricious," "completely irrational," or contrary to essence of arbitration agreement). *See, e.g.*, Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993) (holding decision of arbitration panel refusing to award mandatory statutory damages under Florida securities laws was arbitrary and capricious and unenforceable); Delta Air Lines, Inc. v. Air Line Pilots Ass'n, 861 F.2d 665, 671 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989) (holding unenforceable arbitrator's decision that airline had no just cause for discharging pilot who flew passenger plane while intoxicated violated clearly established public policy, but admitting that examples of arbitration results so offensive to public policy that they should be set aside are not readily found); Stroh Container Co. v. Delphi Indus., 783 F.2d 743, 749-50 (8th Cir. 1986) (stating an arbitration decision may only be irrational where it fails to draw its essence from agreement); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991) (holding arbitrator's decision must be upheld unless it is "completely irra-

3. Criticisms of E.U. Consumer Directive

Even though the Consumer Directive provides some consumer protection measures in arbitration,[167] it is not without criticism. For example, the good faith standard applicable to terms in consumer contracts is not adequately defined in the Consumer Directive and leads to inconsistent application within Member States.[168] The Consumer Directive also requires an opportunity for the consumer to review contract terms, but what actually constitutes an adequate review is not clear.[169] Most notably, the Consumer Directive's explicit allowance of more stringent national legislation regarding unfair terms in consumer contracts[170] encourages inconsistent consumer protection

---

tional" or constitutes "manifest disregard of the law"); Hoffman v. Cargill Inc., 236 F.3d 458, 462 (8th Cir. 2001) (stating in dicta possibility of vacating arbitration award on grounds that proceedings were "fundamentally unfair").

167. *See* Consumer Directive, *supra* note 9, at annex (q) (referring to exclusion or hindrance of consumer's right to take legal action or exercise other legal remedies). *See also* LOCKETT & EGAN, *supra* note 6, at 48-49 (stating restrictions on legal remedies provision is most applicable to arbitration agreements and provision does not prohibit arbitration clauses in consumer contracts, but places restrictions on their use); Sternlight 2, *supra* note 29, at 844-48 (stating Consumer Directive includes non-enforcement of contractual provision excluding or hindering consumers' right to take legal action or other legal remedy, particularly by requiring consumer to take disputes exclusively to arbitration). It appears that if an arbitration agreement refers to a body not governed by legal provisions, or restricts the use of evidence normally available to the consumer, it might be deemed unfair. *Id.* at 845. Unfair clauses could also be where sellers or suppliers seek to reverse the legal burden of proof to their own advantage, even where sellers or suppliers attempt to argue such clauses were individually negotiated. *Id.*

168. *See also* LOCKETT & EGAN, *supra* note 6, at 22-23 (pointing out that preamble provides definition of good faith which is further supported by list of potentially unfair terms indicated in Consumer Directive annex). The good faith test does not seem to be affected by the honesty or dishonesty of the supplier or seller, but rather measures unfairness by whether the contractual term causes a significant imbalance in the parties' rights and obligations. *Id.*; Drahozal & Friel, *supra* note 8, at 364 (stating concept of unfairness is nebulous but is detailed further in regulations and in Consumer Directive). Different meanings may be attached to it by law in Member States. *Id.* In the United Kingdom, for example, good faith refers to whether a thing is in fact done honestly. *Id.*

169. *See* Consumer Directive, *supra* note 9, pmbl. (stating that consumer should actually be given an opportunity to examine all terms). *See also* LOCKETT & EGAN, *supra* note 6, at 25 (stating that what constitutes an examination under Consumer Directive is not clear, and lack of clarification may be source of confusion throughout Member States). It could be construed as requiring the seller or supplier to provide copies of all contract terms, or ensuring that the consumer actually understands the effect of the relevant terms. *Id.*

170. *See* Consumer Directive, *supra* note 9, art. 8 (providing that Member States may adopt or retain most stringent provisions compatible with Treaty in area covered by

among Member States.[171]

B. *Arbitration is Even More Difficult in Cross-Border Consumer Transactions*

Increased consumer arbitration difficulties in cross-border consumer transactions may be attributable to the N.Y. Convention's limited application of the non-arbitrability doctrine and limited public policy and unconscionability defenses to arbitration agreements.[172] Furthermore, the lack of separate consumer protocols in international arbitration providers' rules[173] and the

---

Consumer Directive, to ensure maximum degree of protection for consumer). The preamble further states that Member States may continue or introduce national legislation which affords consumers a higher level of protection than that stipulated in the Directive. *Id.* at pmbl. *See also* LOCKETT & EGAN, *supra* note 6, at 31 (discussing that Consumer Directive permits more stringent national legislation and addressing potential problem of allowing individual Member States to develop more stringent requirements); Stephen Weatherill, *Article in Honor of Professor Alan Watson: Can There be Common Interpretation of European Private Law?*, 31 GA. J. INT'L & COMP. L. 139, 154-55 (2002) (discussing implementation of Consumer Directive in Member States, and noting that the accommodation of European Community minimum standards within national systems is not straightforward).

171. *See* LOCKETT & EGAN, *supra* note 6, at 29-30 (stating that one problem with this approach is that it might be adopted differently in each Member State and noting that recommendations were made to avoid this problem, including notice of decisions on implementation to Commission, involvement by European Court of Justice in determining test of fairness, and establishment of Ombudsman institution, but none were adopted). *See also* Weatherill, *supra* note 170, at 156 (stating that Consumer Directive is attempt to create E.U. legislative harmonization, and acknowledging that one criticism is that intervention in name of harmonization may fail to take sufficient account of complex functions performed by private law in mature national legal system and accordingly destabilize integrity of national systems).

172. *See* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 360-66 (1981) (citing jurisdictions that differentiate between domestic and foreign public policy and stating that matters considered to pertain to public policy in domestic relations do not necessarily pertain to public policy in international relations and number of matters considered to fall under public policy in international cases is smaller than that in domestic cases); BORN 1, *supra* note 4, at 824-25 (discussing narrow interpretation of public policy exception in developed trading states and citing to decisions that demonstrate such interpretation); REDFERN & HUNTER, *supra* note 27, at 473-74 (citing Swiss decision K.S. A.G. v. CC. SA., (1995) XX Y.B. COM. ARB. 762, 763-64, and stating this decision, as well as others from courts in different parts of world show readiness to limit, even at times severely, public policy defense to enforcement). *See also* BORN 1, *supra* note 4, at 228 (discussing unconscionability claims and national courts' reluctance to find international arbitration agreements unconscionable); Sternlight 2, *supra* note 29, at 835 (discussing U.S. policy enforcing pre-dispute arbitration agreements with consumers and employees despite claims of unconscionability).

173. *See, e.g.*, ICC Rules, *infra* note 186 (providing for no special consumer proto-

uncertain laws and treaties governing Internet commerce further complicate the picture for consumers.[174]

1. N.Y. Convention Restricts Ability to Control Consumer Arbitration

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[175] ("N.Y. Convention") is a treaty that governs non-domestic arbitration between countries such as the United States and E.U. Member States.[176] The N.Y. Convention requires national courts to recognize and enforce foreign arbitral awards and arbitration agreements.[177] Na-

---

cols); LCIA Rules, *supra* note 186 (providing no reference to separate rules or procedures when consumers involved). *But see* AAA Consumer Rules, *supra* note 44 (applying consumer rules when agreement stipulates AAA rules apply and agreement is between consumer and business); NAF Consumer Rules, *supra* note 44 (establishing procedures for NAF arbitrations when consumers involved); JAMS Consumer Rules, *supra* note 44 (stating JAMS will only administer arbitrations between companies and individual consumers if arbitration clause and specified rules comply with minimum standards of fairness).

174. *See* Martin, *supra* note 8, at 145-46 (discussing draft Hague Convention and its protection of consumer's right to sue in home state and contrasting this approach to that of United States). *See also* FTC Workshop Comments, *supra* note 5 (expressing E.U. opposition to binding consumer arbitration in online disputes in response to June 2000 FTC workshop); Sternlight 2, *supra* note 29, at 846-47 (discussing E.U. response to FTC workshop that binding pre-dispute consumer arbitration is disfavored); Stewart & Matthews, *supra* note 1, at 1119 (stating that agreement on Hague Convention proposals dealing with consumer Internet commerce is unlikely because E.U. and U.S. have very different attitudes toward issue).

175. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, 21 U.S.T. 2518 (1970) [hereinafter "N.Y. Convention"] (establishing N.Y. Convention).

176. *See id.* art. I(1) (stating that N.Y. Convention applies to recognition and enforcement of arbitral awards made in territory of State other than State where recognition and enforcement of such awards are sought and that it shall also apply to arbitral awards not considered as domestic awards in State where their recognition and enforcement are sought). *See also* VAN DEN BERG, *supra* note 172, at 1-6 (discussing history of N.Y. Convention as probably most significant contemporary international agreement relating to commercial arbitration, and noting it has been regarded as cornerstone of current international commercial arbitration). *See also* BORN 1, *supra* note 4, at 3 (stating N.Y. Convention was signed in 1958 in New York under U.N. auspices and has been ratified by more than 120 Nations, including all significant trading States and most major developing States). The U.S. entered the treaty into force on December 29, 1970. *Id.* at 992; Gibbons 1, *supra* note 1, at 49 (stating that if consumer dispute is commercial in nature and is between parties in different countries or parties in same country seeking to enforce award in third country, then arbitration may result in "foreign" arbitration award for purposes of N.Y. Convention).

177. *See* N.Y. Convention, *supra* note 175, art. III (stating each Contracting State shall recognize arbitral awards as binding and enforce them); *id.* art. II(1) (stating each

tional legislation codifies the principles of the N.Y. Convention[178] and may overlap with various sources of national law that affect international arbitration agreements and awards.[179]

For the N.Y. Convention to apply: (1) the agreement must have some foreign or international connection;[180] (2) it must be in writing;[181] (3) there must be a reciprocity requirement relat-

---

Contracting State shall recognize agreement in writing under which parties undertake to submit to arbitration). *But see id.* art. V (stating when recognition and enforcement may be refused). *See also* BORN 1, *supra* note 4, at 704-11 (discussing in detail enforcement and recognition of awards under N.Y. Convention); *id.* at 155-61 (discussing presumptive validity of arbitration agreements under N.Y. Convention).

178. *See, e.g.*, 9 U.S.C. §§ 201-208 (2000) (codifying N.Y. Convention in FAA); English Arbitration Act, *supra* note 73, Ch. 23, Part III, §§ 100-104 (codifying N.Y. Convention in United Kingdom). *See also* MACNEIL ET AL., *supra* note 30, at 44:34 (stating that United States acceded to N.Y. Convention in 1970 and Congress enacted FAA §§ 201-208 providing for enforcement of N.Y. Convention in American courts).

179. *See* BORN 1, *supra* note 4, at 38 (stating there is considerable overlap among various sources of U.S. law because arbitration agreements and awards falling under N.Y. Convention are governed by N.Y. Convention and second chapter of FAA, but they may also be governed by domestic chapter of FAA to extent it does not conflict with N.Y. Convention). *See also* MACNEIL ET AL., *supra* note 30, at 44:35 (stating legal basis of private international arbitration is amalgam of treaties and national law of various States, such as United States, where amalgam consists of N.Y. Convention, Inter-American Convention and FAA, both domestic and international provisions); Park 2, *supra* note 105, at 809-10 (stating that N.Y. Convention promotes international currency of commitments to arbitrate by requiring deference to valid arbitration agreements and allowing courts to enforce foreign awards as they would domestic ones). Several defenses to enforcement exist, however, such as allowing a court to reject awards tainted with excess of authority and procedural irregularity. *Id.* at 810. The forum's own interests are also protected by withholding support for awards that deal with non-arbitrable subjects or violate public policy. *Id.*

180. *See* N.Y. Convention, *supra* note 175, art. I (stating that N.Y. Convention shall apply to recognition and enforcement of arbitral awards made in territory of State other than State where recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal and shall also apply to arbitral awards not considered as domestic awards in State where their recognition and enforcement are sought). *See also* BORN 1, *supra* note 4, at 119-26 (discussing in further detail "foreign" or "international" requirement). Such a requirement is consistent with the facilitation of the international arbitral process, without disturbing local domestic arbitration legal rules. *Id.* at 119.

181. *See* N.Y. Convention, *supra* note 175, art. II (stating that each Contracting State shall recognize agreement in writing which may include arbitral clause in contract or arbitration agreement, signed by parties or contained in exchange of letters or telegrams). *See also* BORN 1, *supra* note 4, at 127 (discussing further requirement for written agreement but noting that national courts have not interpreted Art. II(2) uniformly). U.S. courts have taken a fairly expansive view of the writing requirement, upholding exchanges of telexes containing arbitration clauses to which the parties did not object, arbitration clauses exchanged in letters or unsigned forms, and those contained in written offers pursuant to which the offeror commenced performance that the of-

ing to the arbitration award;[182] (4) there must be some commercial relationship between the parties[183] and a dispute that arises from defined legal relationships, such as a contract or transaction.[184] The N.Y. Convention codifies the presumptive validity of arbitration agreements.[185] As is generally the case in the international context, arbitration agreements are separable from the

---

feree accepted. *Id;* REDFERN & HUNTER, *supra* note 27, at 141-43 (stating that there must be an agreement to arbitrate in writing).

182. *See* N.Y. Convention, *supra* note 175, art. I(3) (stating that any State may declare on basis of reciprocity that it will apply N.Y. Convention). *But see id.* art. XIV (stating Contracting State is not entitled to avail itself of present N.Y. Convention against other Contracting States except to extent that it is itself bound to apply N.Y. Convention). *See also* BORN 1, *supra* note 4, at 140-41 (citing 9 U.S.C.A. § 201 of FAA and stating U.S. reservation provides that United States will apply N.Y. Convention on basis of reciprocity to recognition and enforcement of only those awards made in territory of another Contracting State). Such reservation is determined by reference to the place where the arbitration is conducted and the award is made, not by the parties' nationalities. *Id.* at 141. It is not as clear whether reciprocity applies to arbitration agreements, as distinguished from awards. *Id. See also id.* at 140-48 (discussing further the reciprocity requirement); REDFERN & HUNTER, *supra* note 27, at 456 (stating reciprocity reservation of N.Y. Convention has effect of applying only to awards in States that are party to N.Y. Convention instead of all foreign awards).

183. *See* N.Y. Convention, *supra* note 175, art. I(3) (establishing State may also declare that it will apply N.Y. Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under national law of State making such declaration). *See also* BORN 1, *supra* note 4, at 149-50 (discussing further commercial relationship requirement and stating requirement is generally interpreted broadly, and has produced few difficulties in most national courts); REDFERN & HUNTER, *supra* note 27, at 457 (stating that commercial reservation narrows scope of application of N.Y. Convention, but recognizes that difficulties arise because each State may determine that certain relationships are not commercial); Gibbons 1, *supra* note 1, at 56 (stating that some States may limit the definition of "commercial" to exclude consumer transactions, but recognizing that redefining term to exclude such contracts would violate spirit if not letter of N.Y. Convention unless Member State willing to exclude consumer contracts from all forms of arbitration).

184. *See* N.Y. Convention, *supra* note 175, art. II(3) (requiring arbitration agreement be in respect of defined legal relationship, whether contractual or not). *See also* BORN 1, *supra* note 4, at 152-53 (discussing existing or future differences and defined legal relationship requirements and stating Aticles I(1) and I(3) have been interpreted as implying requirement that difference exist between parties); REDFERN & HUNTER, *supra* note 27, at 139 (stating that distinction between existing dispute and future dispute is only important in few States that insist that parties cannot agree in advance to submit dispute to arbitration but can only agree to arbitrate once dispute has arisen).

185. *See* N.Y. Convention, *supra* note 175, art. II(1) (stating each Contracting State shall recognize arbitration agreements in writing concerning subject matter capable of settlement by arbitration); *id.* art. II(3) (stating that when parties have made agreement within meaning of this Article, court of Contracting State shall at request of one of parties refer them to arbitration, unless it finds that agreement is null and void, inoperative or incapable of being performed). *See also* BORN 1, *supra* note 4, at 158 (stating Articles II(1) and II(3) of N.Y. Convention impose basic obligation to recognize arbitra-

underlying contract[186] and the arbitral tribunal has the authority to decide disputes over the interpretation and enforceability of the arbitration agreement.[187] National courts have limited discretion to stay arbitration proceedings where the arbitration agreement is enforceable under the N.Y. Convention.[188] Judicial

---

tion agreements); *id.* at 157-67 (discussing further the presumptive validity of international arbitration agreements).

186. *See* BORN 1, *supra* note 4, at 57 (discussing doctrine of separability as allowing continued validity of arbitration clause when underlying contract contains defects). It also permits application of different substantive laws to the arbitration agreement and the underlying contract. *Id.* at 68. If however, the arbitration clause is defective, the result would be judicial and arbitral proceedings where the scope or enforceability of the provision as well as merits of the dispute must be litigated. *Id.* at 8. The leading institutional rules also support separability. *See, e.g.*, Rules of Arbitration of the ICC, art. 6(4) (effective Jan. 1, 1998), *available at* http://www.iccwbo.org/court/english/arbitration/rules.asp#article_6_2 [hereinafter ICC Rules] (stating tribunal continues to have jurisdiction to determine rights of parties and adjudicate claims even though contract itself may be non-existent or null and void); London Court of International Arbitration ("LCIA") Rules, art. 23.1, (effective Jan. 1, 1998), *available at* http://www.lcia-arbitration.com/lcia/arb/uk.htm [hereinafter LCIA Rules] (stating arbitration agreement that is part of another agreement shall be treated as independent, and tribunal's jurisdiction is not affected if other agreement is non-existent, invalid or ineffective); United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules, art. 21, *available at* http://www.uncitral.org/en-index.htm [hereinafter UNCITRAL Rules] (stating arbitration agreement is treated as independent of other terms of contract); AAA International Dispute Resolution Procedures, art. 15(2), (effective July 1, 2003) *available at* http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=Upload\LIVESITE\Rules_Procedures\National_International\ .\ .\focusArea\international\AAA175current.htm#Intl_Arbitration [hereinafter AAA International Rules] (stating arbitration clause is treated as agreement independent of other terms of contract).

187. *See* BORN 1, *supra* note 4, at 85 (discussing competence-competence doctrine where arbitrators generally have broad powers, absent clear agreement to contrary, to determine challenges to their own jurisdiction). This practice is supported by the institutional arbitration rules of the major arbitration providers. *See, e.g.*, ICC Rules, *supra* note 173, art. 6(2) (stating any decision as to tribunal's jurisdiction shall be taken by tribunal); LCIA Rules, *supra* note 173, § 23.1 (stating tribunal has power to rule on its own jurisdiction); UNCITRAL Rules, *supra* note 186, art. 21(1) (stating tribunal has power to rule on objections to its jurisdiction); AAA International Rules, *supra* note 186, art. 15 (stating tribunal has power to rule on its own jurisdiction). *But see* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) (holding courts should not assume parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so); BORN 1, *supra* note 4, at 92 (discussing in further detail competence-competence issue and *First Options* decision, but stating lower U.S. courts have held various institutional arbitration rules commit issues of arbitrability to arbitrators). First Options reflects the current law under the FAA regarding allocation between arbitrators and courts to resolve disputes over the arbitration agreement. *Id.* at 90. *See generally* Adriana Dulic, *First Options of Chicago, Inc. v. Kaplan and the Kompetenz-Kompetenz Principle*, 2 PEPP. DISP. RESOL. L.J. 77 (2002) (analyzing doctrine of competence-competence and critically analyzing *First Options* opinion).

188. *See* BORN 1, *supra* note 4, at 159 (stating most national courts have empha-

review of the merits of an award is very limited.[189] Arbitrators are also not required to correctly apply the law to a particular dispute and they may even apply *lex mercatoria* (a non-national system of law).[190] Articles II and V of the N.Y. Convention, however, do provide grounds on which a court of a signatory nation may decline to enforce an arbitration agreement or foreign arbitration award.[191]

---

sized pro-arbitration policies of N.Y. Convention, and narrowly interpret N.Y. Convention's exceptions to enforceability of such agreements). *See, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 517 n.10 (1974) (holding goal of N.Y. Convention was to encourage recognition and enforcement of commercial arbitration agreements in international contracts and to unify standards by which arbitration agreements are observed).

189. *See* N.Y. Convention, *supra* note 175, art. V (establishing grounds when recognition and enforcement of arbitration award may be refused); REDFERN & HUNTER, *supra* note 27, at 460 (stating that grounds for refusal of enforcement of award as enumerated in Article V have to be construed narrowly and recognizing that most national courts recognize this standard). *But see* BORN 1, *supra* note 4, at 809-10 (stating there may also be non-statutory reason for refusing recognition and enforcement of N.Y. Convention award and citing U.S. cases that suggest "manifest disregard" defense is available). *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985) (reasoning that there is substantive review at award-enforcement stage, but stating that it remains minimal).

190. *See* REDFERN & HUNTER, *supra* note 27, at 433-44 (stating that there is no provision in Model Law for any form of appeal from arbitral award on law or on facts or for any judicial review of merits of award and recognizing that internationally, balance has come down strongly in favor of finality, and against judicial review, except in very limited circumstances). Each State, however, may adopt its own standards for reviewing an award on the merits. *Id.* at 434-35; BORN 1, *supra* note 4, at 797 (stating that N.Y. Convention does not contain exception permitting non-enforcement of arbitral award simply because arbitrators got their decision wrong and recognizing that most developed national arbitration statutes omit any provision for judicial review of merits of award in action to enforce). *See also* Gibbons 1, *supra* note 1, at 11 (stating that in contrast to courts, arbitrators draw their authority and sources of law from contract so they are not necessarily bound to base their decision on particular domestic law and tribunals have no mandate to follow statutes of various countries); REDFERN & HUNTER, *supra* note 27, at 126 (discussing *lex mercatoria* and noting that some jurisdictions allow arbitrators to decide according to "rules of law" as opposed to law of particular jurisdiction). The ICC rules allow the parties to choose the application of "rules of law" to govern the dispute, but in the absence of such an agreement, the arbitrators may apply the rules of law it deems appropriate, affording the arbitrators great flexibility. *Id.*

191. *See* N.Y. Convention, *supra* note 175, art. V(2) (stating recognition and enforcement of arbitral award may also be refused if competent authority in country where recognition and enforcement is sought finds that: (a) subject matter of difference is not capable of settlement by arbitration under law of that country; or (b) recognition or enforcement of award would be contrary to public policy of that country); BORN 1, *supra* note 4, at 160 (stating Article II(3) typically refers to, among other things, defenses such as fraud, duress, unconscionability, illegality, mistake, lack of capacity, and defects in formation). *See also* Jay R. Sever, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?*, 65 TUL. L. REV.

An arbitration agreement or award under the N.Y. Convention may be refused enforcement (1) where there are unconscionability defenses that make the arbitration agreement null and void, inoperative or incapable of being performed,[192] (2) the subject matter of the dispute is not capable of settlement by arbitration ("non-arbitrability") and instead must be resolved by a court of law,[193] or (3) enforcement is contrary to public policy.[194]

Objections to the validity of an arbitration agreement may include contract law challenges such as fraudulent inducement,

---

1661, 1665-66 (discussing application of inarbitrability and public policy to international arbitration and noting that these challenges remain most important checks on arbitration that international community has accepted).

192. *See* N.Y. Convention, *supra* note 175, art. II(3) (stating that where parties agreed to arbitrate, court of Contracting State shall refer parties to arbitration unless it finds agreement is null and void, inoperative or incapable of being performed). *See also* BORN 1, *supra* note 4, at 160 (stating Article II(3) typically refers to, among other things, defenses such as fraud, duress, unconscionability, illegality, mistake, lack of capacity, and defects in formation); VAN DEN BERG, *supra* note 172, at 123-24 (discussing that N.Y. Convention leaves such matters to municipal law).

193. *See* N.Y. Convention, *supra* note 175, art. II(1) (stating that arbitration agreements shall be recognized if they concern subject matter that can be settled by arbitration); *id.* art. V(2) (stating additional ground for refusal of recognition and enforcement of arbitral award may be found if subject matter of difference is not capable of settlement by arbitration, or recognition or enforcement of award would be contrary to public policy). *See also* BORN 1, *supra* note 4, at 245 (stating together such provisions allow assertion of Non-Arbitrability Doctrine as defense to enforcement of arbitration agreements and awards under N.Y. Convention); *id.* at 243 (stating Non-arbitrable claims differ from nation to nation, but generally include claims, that because of their perceived public importance or need for formal judicial procedures and protections are incapable of resolution by arbitration); REDFERN & HUNTER, *supra* note 27, at 471 (stating that arbitrability under art. V(2)(a) of N.Y. Convention is issue for law of enforcement State and varies from State to State because governed largely by questions of public policy).

194. *See* N.Y. Convention, *supra* note 175, art. V(2)(b) (stating that recognition and enforcement of arbitral award may also be refused if competent authority in country where recognition and enforcement is sought finds that recognition or enforcement of award would be contrary to public policy of that country). *See also* REDFERN & HUNTER, *supra* note 27, at 472 (stating that public policy referred to in N.Y. Convention is public policy of enforcement state, and it appears to apply differently to international awards and purely domestic awards); VAN DEN BERG, *supra* note 172, at 376 (discussing public policy exception to enforcement under Article V(2)(b) and stating it basically concerns fundamental moral convictions and policies of forum). The public policy exception works with Article V(1)(b) concerning violation of due process, and Article V(2)(a) regarding questions of non-arbitrable subject matters. *Id.* It is frequently invoked, but mostly cited for situations where there is a lack of impartiality of arbitrators and lack of reasoned awards. *Id.* at 377. *See generally* BORN 1, *supra* note 4, at 815-32 (discussing public policy exception under N.Y. Convention).

fraud, illegality, unconscionability or duress, and waiver.[195] National laws, such as the English Arbitration Act, may also deny recognition of agreements to arbitrate particular types of claims and impose restrictions on the validity of arbitration agreements.[196]

a. Non-Arbitrability/Public Policy Challenge is Rarely Successful

It is possible to challenge an arbitration agreement as non-arbitrable.[197] Enforcement of the award may also be challenged where it would be contrary to public policy.[198] Non-arbitrability

---

195. *See* N.Y. Convention, *supra* note 175, art. II(3) (stating that where parties agreed to arbitrate, court of Contracting State shall refer parties to arbitration unless it finds agreement is null and void, inoperative or incapable of being performed). *See also* BORN 1, *supra* note 4, at 195 (stating arbitration agreements may be challenged using grounds parallel to those available under generally-applicable contract law to contest validity of any contract such as fraudulent inducement, fraud, illegality, unconscionability or duress and waiver); *id.* at 160 (stating Article II(3) typically refers to, among other things, defenses such as fraud, duress, unconscionability, illegality, mistake, lack of capacity, and defects in formation); VAN DEN BERG, *supra* note 172, at 123-24 (discussing that N.Y. Convention leaves such matters to municipal law).

196. *See* BORN 1, *supra* note 4, at 209 (stating illegality challenges raise issues such as separability doctrine, allocation of power between national courts and arbitrators, and choice of applicable law). The national law in many countries also imposes various restrictions on legality and validity of arbitration agreements which may not be applicable to other types of contracts. *See, e.g.*, Consumer Directive, *supra* note 9, ann. (q) (establishing Directive on unfair terms in consumer contracts that considers binding pre-dispute arbitration clauses as unfair in certain situations); English Arbitration Act, *supra* note 73, § 91 (establishing that compulsory arbitration clause that applies to amount less than certain pecuniary amount is automatically unfair). *See also* Ponte, *supra* note 3, at 461-62 (discussing how national laws in countries such as England allow consumers to only agree to use ADR after conflict arises).

197. *See* N.Y. Convention, *supra* note 175, art. II(1) (referring to recognition of agreement to arbitrate subject matter capable of settlement by arbitration); *id.* at art. V(2)(a) (referring to refusal of recognition and enforcement of award where subject matter of difference is not capable of settlement by arbitration). *See also* VAN DEN BERG, *supra* note 172, at 368-75 (discussing non-arbitral subject matter as grounds for refusal to enforce award under N.Y. Convention); REDFERN & HUNTER, *supra* note 27, at 471 (discussing that arbitrability governed by each State's own concept of what disputes should be reserved for courts of law and what disputes may be resolved by arbitration); BORN 1, *supra* note 4, at 243 (stating N.Y. Convention contains exceptions to general obligations in Articles II and V(2)(a) to enforce written arbitration agreements, specifically where arbitration of disputes not capable of settlement by arbitration or subject matter of difference is not capable of settlement by arbitration under law).

198. *See* N.Y. Convention, *supra* note 175, art. V(2)(b) (stating that recognition and enforcement of arbitral award may also be refused if competent authority in country where recognition and enforcement is sought finds that recognition or enforcement of award would be contrary to public policy of that country). *See also* REDFERN &

may apply to the arbitration agreement[199] or the arbitration award.[200] Public policy concerns the fundamental moral convictions and policies of the forum and works with Article V(1)(b) concerning violations of due process and Article V(2)(a) regarding questions of non-arbitrable subject matters.[201] Scholars have suggested that the public policy exception to enforcement may be cited where there are concerns that acceding to the N.Y. Convention would disable lawmakers from protecting weaker parties.[202] Even though it is recognized, the public policy exception

---

HUNTER, *supra* note 27, at 472 (stating that public policy referred to in N.Y. Convention is public policy of enforcement State, and it appears to apply differently to international awards and purely domestic awards); VAN DEN BERG, *supra* note 172, at 376 (discussing public policy exception to enforcement under Article V(2)(b) and stating that it basically concerns fundamental moral convictions and policies of forum). The public policy exception works with Article V(1)(b) concerning violation of due process, and Article V(2)(a) regarding questions of non-arbitrable subject matters. *Id.* It is frequently invoked, but mostly cited for situations where there is a lack of impartiality of arbitrators and lack of reasoned awards. *Id.* at 377. *See also* BORN 1, *supra* note 4, at 815-32 (discussing public policy exception under N.Y. Convention).

199. *See* N.Y. Convention, *supra* note 175, art. II(1) (referring to recognition of agreement to arbitrate subject matter capable of settlement by arbitration); *id.* art. II(3) (stating parties do not have to be referred to arbitration if agreement is null and void, inoperative or incapable of being performed). *See also* REDFERN & HUNTER, *supra* note 27, at 148 (discussing arbitrabiltiy with respect to validity of arbitration agreement and stating involves which disputes may be resolved by arbitration and which are reserved for courts); VAN DEN BERG, *supra* note 172, at 152-54 (discussing non-arbitrability doctrine with respect to arbitration agreement).

200. *See* N.Y. Convention, *supra* note 175, art. V(2)(a) (referring to refusal of recognition and enforcement of award where subject matter of difference is not capable of settlement by arbitration). *See also* VAN DEN BERG, *supra* note 172, at 368-75 (discussing non-arbitral subject matter as grounds for refusal to enforce award under N.Y. Convention).

201. *See* N.Y. Convention, *supra* note 175, art. V(2)(b) (establishing public policy exception to enforcement of arbitration award). *See also* VAN DEN BERG, *supra* note 172, at 376-82 (discussing public policy exception to enforcement under Article V(2)(b)); BORN 1, *supra* note 4, at 815 (stating that national legislation uniformly permits the non-recognition of arbitral awards because they violate public policy, and even where national legislation such as FAA in United States does not expressly provide for public policy exception, principle is well-settled).

202. *See* Carrington & Haagen, *supra* note 103, at 363 (comparing N.Y. Convention's grounds for not enforcing foreign award with principles of Wilko v. Swan, 346 U.S. 427 (1953), *rev'd on other grounds*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)). Carrington & Haagen opine that it was never suggested that acceding to the N.Y. Convention would disable Congress or state legislatures from protecting weaker parties from overbearing use of arbitration by those endowed with economic power. *Id.* Indeed, other signatory nations had asserted that foreign awards presuming to adjudicate liabilities under their regulatory laws would not *pro tanto* be recognized in their courts. *Id. See also* VAN DEN BERG, *supra* note 172, at 360 (stating public policy exception applies to enforcement of foreign judgments and appli-

to enforcement under the N.Y. Convention is interpreted more narrowly than in domestic situations.[203] U.S. courts, for example, frequently hold that the public policy exception to enforcement does not apply.[204] There is a fair amount of scholarly debate as to whether the narrow application of the public policy defense is harmful to a forum's regulation of public law matters.[205]

---

cation of foreign law and its function is to guard fundamental moral convictions or policies of forum)

203. *See* VAN DEN BERG, *supra* note 172, at 360-66 (citing jurisdictions that differentiate between domestic and foreign public policy and stating that matters considered to pertain to public policy in domestic relations do not necessarily pertain to public policy in international relations and number of matters considered to fall under public policy in international cases is smaller than that in domestic cases). *See also* BORN 1, *supra* note 4, at 824-25 (discussing narrow interpretation of public policy exception in developed trading states and citing to decisions that demonstrate such interpretation); REDFERN & HUNTER, *supra* note 27, at 473-74 (citing Swiss decision K.S. A.G. v. CC. SA., (1995) XX Y.B. COM. ARB. 762, 763-64, and stating this decision, as well as others from courts in different parts of world show readiness to limit, even at times severely, public policy defense to enforcement). In *K.S. A.G. v. CC. SA.*, the court held that the narrower concept of public policy as applicable in the field of public international law should be applied, as opposed to the wider concept of public policy in the field of municipal law. *Id.* at 474.

204. *See, e.g.*, Fritz Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (distinguishing arbitration agreement to arbitrate SEA claims in international contract and those domestically); Parsons & Whittmore Overseas Co. v. Societe Generale De L'Industrie Du Papier, 508 F.2d 969 (2d Cir. 1974) (holding N.Y. Convention's public policy defense should be construed narrowly and enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate forum State's most basic notions of morality and justice). *See also* REDFERN & HUNTER, *supra* note 27, at 472 (stating that U.S. courts have left practitioners with no doubts as to whether public policy differentiates between international and purely domestic awards); Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972) (stating that we cannot have trade and commerce in world markets and international waters exclusively on U.S. terms, governed by U.S. laws and resolved in U.S. courts).

205. *See* Philip J. McConnaughay, *Reviving the "Public Law Taboo" in International Conflict of Laws*, 35 STAN. J. INT'L L. 255, 285 (1999) (stating that erosion of public law defenses creates risk of underregulation that flows logically and naturally from displacement of forum public law). Different Nations have vastly different regulatory objectives and needs, and as international commerce expands to include less developed Nations, vastly different capacities to promulgate and enforce regulations also exist. *Id.* Displacement of public law allows precisely the harm that forum public law was intended to prevent. *Id.* at 286. Recognition of foreign public law, however, tends to advance the goals and purposes of economic regulation, while the displacement of forum public law tends to diminish them. *Id.* at 290. *But see* VAN DEN BERG, *supra* note 172, at 367 (supporting U.S. narrow application of public policy exception and refuting allegations that U.S. courts' narrow interpretation of public policy exception leaves it "pragmatically useless if not altogether nonexistent"); W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 111 (1992) (stating public policy exception to enforcement acts as safety valve by making explicit

b. It is Unclear Which Law Governs Non-Arbitrability and Public Policy Defenses if the Arbitration Agreement is Challenged

Article V(2) of the N.Y. Convention explicitly provides that the law of the country where enforcement of the arbitration award is sought is the applicable law.[206] The N.Y. Convention, however, is silent as to which law applies to enforcement of the arbitration agreement and non-arbitrability determinations.[207] It is presumed the law of the country where arbitration is sought, or the *lex fori*, applies, but this may depend on whether the challenge is made to the arbitration agreement or the award.[208] Issues may also surface about whether the arbitral tribunal or a national court determines issues on non-arbitrability.[209]

---

what national courts would probably be pressed to do anyway under pressure of endogamous political pressures, and makes adherence to N.Y. Convention easier and reinforces expectations of enforceability).

206. *See* N.Y. Convention, *supra* note 175, art. V(2)(a) (referring to law of country where recognition and enforcement is sought as law which applies to determine if subject matter of difference is not capable of settlement by arbitration). *See also* VAN DEN BERG, *supra* note 172, at 369 (recognizing that Article V(2)(a) refers to law of place where recognition and enforcement of arbitration award is sought); REDFERN & HUNTER, *supra* note 27, at 471 (stating issues of arbitrability under Article V(2)(a) are issues for law of enforcement state).

207. *See* VAN DEN BERG, *supra* note 172, at 152 (stating internal consistency requires that presume law of country where arbitration is sought applies); BORN 1, *supra* note 4, at 244-45 (stating there is little agreement among commentators as to what governing law should apply to non-arbitrability).

208. *See* VAN DEN BERG, *supra* note 172, at 152 (stating internal consistency requires that it be presumed law of country where arbitration is sought, or *lex fori*, is applicable law). *Id.* art. V(2)(a) explicitly refers to the law of the country where enforcement of the award is sought. *Id.* at 369. *See* Sever, *supra* note 191 at 1666 (suggesting non-arbitrability issues are determined by forum law but recognizing that some argue that arbitrability may be determined under some other law). *See, e.g.*, BORN 1, *supra* note 4, at 244-45 (stating there is little agreement among commentators as to what governing law should apply). There are several choices, including a uniform international definition of non-arbitrability, the law governing the parties' arbitration agreement, the law of the place where the arbitration is conducted and the award made, the law of the nation in which enforcement of an award will eventually be sought, the law of the judicial forum where an arbitration agreement is sought to be enforced, or the law that provides the basis for the relevant substantive claim. *Id.* at 244-45. Proceedings to enforce the arbitration agreement may also encourage different choices of law than proceedings to enforce the arbitration award. *Id.* at 245.

209. *See generally* BORN 1, *supra* note 4, at 74-95 (discussing allocation of authority to decide disputes over interpretation and enforceability of arbitration agreements and referencing national laws, including FAA, that clarify whether court or arbitrator decides). *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943-44 (1995) (holding that determination of whether court or arbitrators decide arbitrability turns

c. Limits on Unconscionability Defense

An unconscionability defense, including fraud, duress, illegality, mistake, lack of capacity, and defects in formation, is available under the N.Y. Convention to prevent enforcement of an arbitration agreement.[210] Unconscionability may apply to the underlying contract, in which case the arbitration agreement may still be enforceable because it is a separate and autonomous agreement.[211] For the same reason, an arbitration agreement may be invalidated but the underlying contract may still be enforced.[212] Depending on national law, unconscionability determinations may be made by either a court or the arbitration tribunal,[213] but it is a defense that is rarely accepted.[214]

---

on what parties agreed about that matter and that for courts to assume that parties agreed to arbitrate arbitrability, there must be "clear and unmistakable" evidence that they did so). *See also* BORN 1, *supra* note 4, at 85 (discussing competence-competence doctrine where arbitrators generally have broad powers, absent clear agreement to contrary, to determine challenges to their own jurisdiction).

210. *See* N.Y. Convention, *supra* note 175, art. II(3) (stating that court does not have to refer parties to arbitration if agreement found null and void, inoperable, or incapable of being performed); *id.* art. II(1) (stating that arbitration agreements have to be recognized if subject matter is capable of settlement by arbitration). *See also* BORN 1, *supra* note 4, at 160 (expanding upon definition of "null and void," "inoperable," and "incapable of being performed" under Article II(3) of N.Y. Convention and non-arbitrability exception under Article II(1)); VAN DEN BERG, *supra* note 172, at 123-28 (discussing further exceptions to enforceability of arbitration agreements under N.Y. Convention).

211. *See* BORN 1, *supra* note 4, at 57 (discussing doctrine of separability as allowing continued validity of arbitration clause when underlying contract contains defects); REDFERN & HUNTER, *supra* note 27, at 156 (stating that survival of arbitration clause even where contract null and void depends on reason for which contract found to be void and providing example that where party claims it did not sign contract, no insistence upon autonomy of arbitration agreement can make agreement valid). *See, e.g.*, English Arbitration Act, *supra* note 73, § 7 (stating arbitration agreement which forms or was intended to form part of another agreement shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as distinct agreement); ICC Rules, *supra* note 173, art. 6(4) (stating tribunal continues to have jurisdiction to determine rights of parties and adjudicate claims even though contract itself may be non-existent or null and void).

212. *See* BORN 1, *supra* note 4, at 68 (stating that when arbitration agreement is invalid or illegal, spearability doctrine says it does not affect validity of underlying contract). *See also* ICC Rules, *supra* note 173, art. 6(4) (stating that arbitral tribunal's jurisdiction does not cease if contract claimed to be null and void or non-existent, provided that tribunal upholds validity of arbitration agreement).

213. *See* BORN 1, *supra* note 4, at 213-14 (stating that U.S. courts generally hold that claims of illegality of arbitration agreement itself require judicial resolution under § 4 or § 203 of FAA but issues relating to validity of underlying contract, however, are for arbitral tribunal to decide); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 202(1)

2. International Arbitration Providers Do Not Have Consumer Protocols

Similar to domestic arbitration, parties frequently agree to use the rules or services of a particular arbitration provider as opposed to an *ad hoc* tribunal.[215] One of the most notable organizations involved in international arbitration is the International Chamber of Commerce ("ICC"), which follows the ICC

(1971) (stating effect of illegality upon contract is determined by law selected by application of rules of §§ 187-188). *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967) (holding that where no claim of fraud applies to arbitration clause, broad arbitration clause encompasses arbitration of claim that contract itself was induced by fraud); Soleimany v. Soleimany [1998] 3 WLR 811 (reasoning that just because arbitration clause not normally infected by illegality of contract, does not mean that separate arbitration agreement may not be void for illegality because arbitration agreement to arbitrate illegal or immoral dealings according to English law should not be recognized).

214. *See, e.g.*, Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 575 (1st Dept. 1998) (holding arbitration agreement with consumers enforceable despite contract of adhesion and unconscionability claims by consumers). The *Gateway 2000* court cited the requirements for unconscionability under N.Y. law, which included substantive and procedural unconscionability. *Id.* The court determined that the inequality in bargaining power between the computer manufacturer and the consumer did not amount to such a lack of meaningful choice as to make the agreement procedurally unconscionable. *Id.* The possible inconvenience of the arbitration site (Chicago) was not substantively unconscionable. *Id.* However, the court ruled that the excessive costs entailed in arbitrating before the ICC is unreasonable and acted as a deterrent to the consumer. *Id.* The court cited precedents that demonstrated excessive fees have been grounds for finding arbitration provisions unenforceable. *Id. Gateway 2000* offered to arbitrate under AAA rules. *Id.* The court remanded to the trial court for substitution of an arbitrator and left the question whether AAA costs were equally as oppressive as the ICC rules open. *Id. See also* BORN 1, *supra* note 4, at 228 (discussing unconscionability claims and national courts' reluctance to find international arbitration agreements unconscionable). The U.S. is also reluctant to find arbitration agreements unconscionable under the FAA. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (holding mere inequality in bargaining power is not sufficient reason to hold that arbitration agreements are never enforceable and dismissing unconscionability claims by employee); Sternlight 2, *supra* note 29, at 835 (discussing U.S. policy enforcing pre-dispute arbitration agreements with consumers and employees despite claims of unconscionability).

215. *See* BORN 1, *supra* note 4, at 11 (stating that international arbitrations may be institutional or *ad hoc* and that there are important differences between them). In *ad hoc* arbitration agreements parties generally agree to arbitrate, and may select a preexisting set of procedural rules, such as the UNCITRAL Rules. *Id.* at 12. *See also* REDFERN & HUNTER, *supra* note 27, at 44 (stating that *ad hoc* arbitrations are conducted under procedural rules adopted for purposes of that arbitration and institutional arbitration is administered by one of many specialist arbitral institutions under its own arbitration rules). *See generally* THE INTERNATIONAL ARBITRATION GROUP OF SIMPSON THACHER & BARTLETT, COMPARISON OF INTERNATIONAL ARBITRATION RULES (2d ed. 2002) (providing comparison of various international arbitration organizations' rules).

Rules of Arbitration ("ICC Rules").[216] There are also several other organizations involved in international arbitration, such as the London Court of International Arbitration ("LCIA")[217] and the AAA,[218] and each promulgates its own set of rules.[219]

There are advantages to using institutional rules, including structure, predictability, credibility, and additional institutional services not found in *ad hoc* arbitrations.[220] There are also disad-

---

216. *See* BORN 1, *supra* note 4, at 14 (stating ICC is world's leading international commercial arbitration institution and has less of national character than any other arbitral institution). In 1997 ICC arbitrations were conducted in more than 35 different countries. *Id.* It handles more than 500 cases per year, mostly international and located in many nations throughout the world. *Id.* The most common countries for ICC arbitrations are France, Switzerland, England, other Western European states, and the U.S. *Id.* The ICC also consists of an International Court of Arbitration, which does not decide substantive legal disputes or serve as an arbitrator. *Id.* at 13. *See also* REDFERN & HUNTER, *supra* note 27, at 50 (stating that ICC is one of world's leading organizations in arbitration of international commercial disputes). *See, e.g.*, ICC Rules, *supra* note 173 (establishing rules and procedures for arbitrations conducted under auspices of ICC).

217. *See* BORN 1, *supra* note 4, at 15 (stating LCIA is second most popular European arbitration institution). The LCIA Rules generally provide a sound, neutral basis for international dispute resolution and are generally administered less comprehensively than ICC arbitrations. *Id.* In contrast to other rules, the LCIA Rules set out the powers of the tribunal in detail. *Id. See also* REDFERN & HUNTER, *supra* note 27, at 51 (stating that LCIA aims to provide comprehensive service for disputes arising out of commercial transactions, irrespective of nationality of those involved and its "Arbitration Court" consists of practitioners drawn from major trading nations such as China and Japan); LCIA Rules, *supra* note 173, arts. 14, 15, 19, 20, 21, and 22 (setting out specific powers of tribunal in LCIA arbitrations).

218. *See* BORN 1, *supra* note 4, at 16 (stating AAA International Rules are based on UNCITRAL Arbitration Rules and were intended to permit maximum flexibility and minimum administrative supervision). The AAA administrative staff plays a less significant role than the ICC Secretariat. *Id.* Non-U.S. parties are reluctant to use the AAA International Rules, but the AAA is working to overcome this. *Id.* at 17. *See also* REDFERN & HUNTER, *supra* note 27, at 52 (stating AAA is independent, non-governmental not-for-profit organization dedicated to promotion of alternative forms of dispute resolution and it administers many types of arbitration without limitation as to trade, geographical area, or nature of case); AAA Commercial Arbitration Rules and Mediation Procedures (effective July 1, 2003) *at* http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\..\focusArea\commercial\AAA235current.htm [hereinafter AAA Commercial Rules] (pertaining to arbitrations conducted under AAA auspices); AAA International Rules, *supra* note 186 (establishing rules and procedures for arbitrations conducted under auspices of AAA for international disputes).

219. *See, e.g.*, ICC Rules, *supra* note 173 (establishing rules and procedures for arbitrations conducted under auspices of ICC); LCIA Rules, *supra* note 173, (establishing rules and procedures for LCIA arbitrations); AAA International Rules, *supra* note 186 (establishing rules and procedures for arbitrations conducted under auspices of AAA for international disputes).

220. *See* BORN 1, *supra* note 4, at 12 (stating that more structure and predictability

vantages, namely that the institutional rules' formality and added services equate to additional administrative fees and hefty costs.[221] Most notable to consumers, the ICC and LCIA rules do not contain separate consumer protocols.[222] The AAA, in comparison, allows substitution of the AAA Consumer Rules whenever the arbitration agreement is between a consumer and a business.[223]

3. Internet Commerce Provides An Additional Wrinkle

The online marketplace adds a new wrinkle to resolution of consumer disputes. An ever-increasing number of cross-border

---

may help reduce risks of breakdown between parties and technical defects in award, and credibility increases likelihood that award will be accepted and judicially enforced). The rules also usually provide procedures for choosing arbitrators, and are particularly useful where the parties cannot agree. *Id.* *See also* REDFERN & HUNTER, *supra* note 27, at 45 (stating that rules laid down by established arbitral institutions generally have been proven in practice and have undergone periodic revision to take account of new developments in law). Another advantage is that trained staff is usually provided to administer the arbitration, so that the arbitral tribunal does not have to administer the arbitration as well as preside over it. *Id.*

221. *See* BORN 1, *supra* note 4, at 11 (stating administrative fees can sometimes be substantial and are in addition to compensation paid to arbitrators). One of the greatest criticisms of the ICC Rules is the substantial administrative fees and costs. *Id.* at 15. For commercial parties needing extensive administration assistance during the arbitration, however, such drawbacks may be justified. *Id.* *See also* REDFERN & HUNTER, *supra* note 27, at 46 (stating that major disadvantage of institutional arbitration is that it may prove expensive and suggesting that if amounts at stake are considerable and parties are represented by advisers experienced in conduct of international commercial arbitration, then may be worthwhile to conduct arbitration *ad hoc*). Another disadvantage is the delay which results from formality of arbitral proceedings and necessity to process steps through bureaucratic machinery of arbitral institution. *Id.*

222. *See, e.g.*, ICC Rules, *supra* note 173 (providing for no special consumer protocols); LCIA Rules, *supra* note 173 (providing no reference to separate rules or procedures when consumers involved). *But see* AAA Consumer Rules, *supra* note 44 (applying consumer rules when agreement stipulates AAA rules apply and agreement is between consumer and business, which provides separate procedures for costs and small claims court option); NAF Consumer Rules, *supra* note 44 (establishing procedures for NAF arbitrations when consumers involved, and allowing for some due process protections); JAMS Consumer Rules, *supra* note 44 (stating JAMS policy that it will only administer arbitrations between companies and individual consumers if arbitration clause complies with minimum standards of fairness such as reasonable costs).

223. *See* AAA Consumer Rules, *supra* note 44 (discussing AAA Consumer Rules and stating that in consumer cases, AAA substitutes its Consumer Rules for Commercial Rules or other AAA rules, such as AAA International Rules). *See also* NAF Consumer Rules, *supra* note 44 (establishing procedures for NAF arbitrations when consumers involved); JAMS Consumer Rules, *supra* note 44 (stating JAMS will only administer arbitrations between companies and individual consumers if arbitration clause and specified rules comply with minimum standards of fairness).

B2C transactions are attributable to the Internet, but many of the traditional methods of dispute resolution, such as court litigation, are not appropriate.[224] Jurisdictions such as the European Union have legislation governing such transactions or support guidelines similar to those of the Organization for Economic Co-operation and Development ("OECD") to govern Internet commerce.[225] The draft Hague Convention addresses them as well.[226] The different national ideologies, however, mainly between the E.U. and the United States, have stalled at-

224. *See, e.g.*, *How Many Online*, *supra* note 1 (reporting there are 605.60 million people on Internet worldwide); Stewart & Matthews, *supra* note 1, at 1111 (predicting revenue generated by B2C commerce will approach that generated by B2B commerce); Gibbons 1, *supra* note 1, at 2 (stating B2C commerce will be worth estimated USD 250 billion by end of 2003); ABA Task Force on Electronic Commerce and ADR in Cooperation with the Shidler Center for Law, Commerce and Technology, University of Washington School of Law, *Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 BUS. LAW. 415 (2002) [hereinafter ABA Task Force on E-Commerce and ADR] (noting difficulties associated with resolving disputes arising from cyberspace transactions where transactions are not tied to any particular geographical location and recognizing that Internet needs new forms of dispute resolution to help reduce transaction costs for small value disputes and to erect structures that work well across national boundaries); Gibbons 1, *supra* note 1, at 4-5 (stating that arbitration may offer alternative to state sponsored court problems in B2C commerce because it is potentially fast, convenient, inexpensive, and permits parties to contract around jurisdictional and choice of law questions). Arbitration is frequently offered as a panacea to B2C dispute resolution because it is fast, inexpensive and promotes privacy, certainty, and predictability. *Id.* at 12.

225. *See, e.g.*, Council Regulation No. 44/01, O.J. L12/6, at 7 (2001) [hereinafter Brussels I], arts. 15-17 (establishing Regulation on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial matters which permits consumers in E.U. Member States to sue foreign operators of e-commerce sites who market directly to consumer's home country, in consumer's home country); Distance Selling Directive, *supra* note 9 (dealing with steps by European Union to protect consumers in distance selling). *See also* Martin, *supra* note 8, at 142-43 (discussing Brussels I regulation with respect to online consumer transactions and stating that measure codifies and updates E.U. position on recognition and enforcement of judgments); Stewart & Matthews, *supra* note 1, at 1115 (discussing Distance Selling Directive that reaffirms European Union's prolific course of drafting laws designed to protect online consumers); Pappas, *supra* note 104, at 339 (stating that Distance Selling Directive has been used to regulate electronic contracts and that it imposes several requirements on businesses with regard to consumers); Gibbons 1, *supra* note 1, at 21 (discussing how OECD Guidelines for Consumer Protection in Context of Electronic Commerce represent consensus among major e-commerce global trading nations as to floor on rights of e-consumers to ADR).

226. *See* Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Oct. 30, 1999), *at* http://www.hcch.net/e/conventions/draft36e.html [hereinafter Hague Convention] (providing provision that guarantees consumer's right to sue in their home country). *See also* Martin, *supra* note 8, at 145-46 (discussing draft Hague Convention and its protection of consumer's right to sue in home State and contrasting this approach to that of United States).

tempts to institute uniform protections and standards.[227] Many scholars have suggested changes such as amending the FAA or the N.Y. Convention, online arbitration regulations, or new treaties, to avoid the problems of arbitrating in cross-border disputes, but none have been instituted.[228] The E.U. trend of applying domestic laws to online transactions is also problem-

227. *See* Hague Convention, *supra* note 226, art. 7 (allowing consumers to bring claim in courts of State in which it is habitually resident if certain criteria are met). *See also* Martin, *supra* note 8, at 136 (discussing draft Hague Convention and proposed changes that incorporate proposed alternatives to art. 7). One proposal would allow Member States to declare or reserve the right to refuse enforcement of judgments depending on whether the State's law permits the use of pre-dispute "choice of forum" clauses in consumer contracts. *Id.* Another proposal, however, would expressly exclude consumer contracts from the Hague Convention. *Id.* Article 7 of the Hague Convention has generated controversy, especially from the United States. *Id.* at 139; Stewart & Matthews, *supra* note 1, at 1119 (discussing stalled Hague Convention negotiations and attributing such disagreement on fact that Hague Convention borrows heavily from Brussels I which is based upon European view of how disputes should be settled).

228. *See, e.g.*, Park 2, *supra* note 105, at 820 (suggesting international arbitration statute for commercial parties that removes consumer and employment arbitration). Explicitly excluding such contracts from the statute's scope would reduce the conflict that has arisen abroad when international arbitration statutes were not clear about their coverage. *Id.* at 821; Gibbons 1, *supra* note 1, at 790-92 (suggesting reforms to commercial arbitration in cyberspace to level playing field for participation of non-commercial parties and discussing disadvantages of each proposal). The options include *laissez-faire* attitude toward regulating arbitration, but that waiting until critical mass of cyberian consumers have been injured by ill considered arbitration clauses, procedures, and awards, and that this only works when consumers have complete information. *Id.* at 791. Another suggestion includes requiring institutional arbitration, but that does not address that merchants will draft mass market contracts to maximize their legal protections and those are the same merchants who control arbitration. *Id.* Finally, arbitration in cyberspace between merchants and consumers could be banned or aggressively regulated, but that could result in consumers losing communicative advantages of cyberspace for purposes of dispute resolution and would deny parties of benefits of arbitration. *Id.* at 792; Stewart & Matthews, *supra* note 1, at 1137-38 (discussing suggestions for regulation of cyberspace using online arbitration of B2C disputes). One suggestion includes amending the N.Y. Convention to account for online dispute resolution procedures, but such attempts may jeopardize the level of success that has been achieved since its enactment. *Id.* at 1137. A new document could also be created, but that could take considerable time and current national policies that only enforce post-dispute arbitration agreements with consumers make it unlikely that a treaty that provides for mandatory enforcement of pre-dispute agreements would be ratified. *Id.* at 1138; Alderman, *supra* note 16, at 1266 (suggesting amendment to FAA that defines consumer transaction and prohibits pre-dispute arbitration agreements with consumers); Richard E. Speidel, *Consumer Arbitration Of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1082-83 (1998) (stating that despite limited judicial review of arbitration awards under FAA, there is growing evidence that in statutory claims courts find way to subject decision to judicial review or embrace manifest disregard standard of review).

atic,[229] especially where the domestic laws conflict between the parties.[230] One of the leading cases demonstrating this is *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme ("LICRA").*[231] *Yahoo! Inc.* involved an Internet provider, headquartered in the United States, that was sent a cease and desist order from LICRA, a French not-for-profit organization.[232] LICRA wanted Yahoo! to stop allowing end users to post Nazi memorabilia on its online auction site, which was a violation of French law.[233] A French Court entered an order directing Yahoo! to remove the material from its sites and threatened a penalty of USD 13,300 per day for noncompliance.[234] Yahoo! refused, claiming that such a ban violated the right to free speech guaranteed by the U.S. Constitution.[235] Yahoo! then sought a declaratory judgment in the U.S. District Court in California declaring the

229. *See* Stewart & Matthews, *supra* note 1, at 1116 (stating European Union has adopted country of destination approach which makes law of consumer's domicile applicable as law governing online B2C transactions). *See also* Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme, 145 F. Supp.2d 1168 (N.D. Ca. 2001) (holding U.S. court could not enforce order by French court ordering Internet company headquartered in United States to remove Nazi-related materials from its website because it violated French statute).

230. *See* Drahozal & Friel, *supra* note 8, at 374 (discussing enforceability of predispute arbitration agreements in United States); Sternlight 2, *supra* note 29, at 835 (discussing U.S. policy enforcing pre-dispute arbitration agreements with consumers and employees). *See also* FTC Workshop Comments, *supra* note 5 (expressing E.U. opposition to binding consumer arbitration in online disputes in response to June 2000 FTC workshop); Sternlight 2, *supra* note 29, at 846-47 (discussing E.U. response to FTC workshop that binding pre-dispute consumer arbitration is disfavored); Stewart & Matthews, *supra* note 1, at 1119 (stating that agreement on Hague Convention proposals dealing with consumer Internet commerce is unlikely because E.U. and United States have very different attitudes toward the issue).

231. 169 F. Supp. 2d 1181, 1192 (N.D. Ca. 2001) (holding judgment issued by French court against Internet company headquartered in United States for violating French statute forbidding display of Nazi-related materials unenforceable). *See also* Stewart & Matthews, *supra* note 1, at 1116-18 (discussing *Yahoo! Inc.* and its demonstration of difficulties in European courts trying to apply country of destination policy to online disputes); Lewis R. Clayton, *Yahoo!: A French Court Order's Power in the U.S.*, N.Y. L.J., 3 (2001) (stating that court declared unenforceable in United States French court order directing that Internet portal Yahoo! prevent auction of Nazi artifacts and block access to pro-Nazi web sites).

232. *See Yahoo!*, 169 F. Supp. 2d at 1184 (stating that La Ligue Contre Le Racisme Et l'Antisemitisme ("LICRA") sent cease and desist letter to Yahoo! in California informing it that sale of Nazi and Third Reich related goods through its auction services violated French law and threatened legal action).

233. *Id.* at 1184.

234. *Id.* at 1185.

235. *Id.* at 1186.

French order unenforceable.[236] The District Court granted the declaratory judgment, reasoning that even though France has the sovereign right to pass laws for the benefit of its citizenry, a U.S. court could not enforce a foreign order that violated the U.S. Constitution by chilling protected speech that occurs simultaneously within U.S. borders.[237] Additionally, the court held that absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the Court was obligated to uphold the U.S. Constitution over comity.[238]

III. *PUT THE LID ON PANDORA'S BOX: LEAVE THE ARBITRATION OF CROSS-BORDER DISPUTES TO COMMERCIAL PARTIES AND KEEP IT AWAY FROM CONSUMERS*

Arbitration is an effective and reasonable alternative for business parties seeking to resolve disputes, especially in the cross-border or international context.[239] Just because arbitration may be a better choice than litigation in those situations, however, does not mean that arbitration is appropriate for consumers involved in cross-border transactions.

Arbitration is not an appropriate form of dispute resolution for consumers in domestic cases.[240] In its binding pre-dispute form and with the conflicting national policies on its use, reliance on arbitration to resolve consumer disputes in cross-border transactions is even more dubious. First, it allows inconsistent treatment of the parties based upon which jurisdiction they come from. Second, the purported savings in transactional costs to both consumers and commercial parties are not realized by using arbitration in cross-border disputes. Third, by allowing ar-

236. *Id.*

237. *Id.* at 1192.

238. *Id.* at 1193.

239. *See supra* notes 109-15 and accompanying text (discussing purported benefits of arbitration such as expert decisionmakers, procedural simplicity, flexibility, confidentiality, and reduced costs).

240. *See, e.g., supra* notes 127-33 and accompanying text (stating some negative aspects of arbitration for consumers, such as adhesive agreements and requirement that arbitrators do not need to correctly apply law). *See also supra* notes 153-57 and accompanying text (recognizing that narrow review of awards and consumer's burden to prove prohibitive costs also make arbitration inappropriate for consumer disputes).

bitration of consumer cross-border disputes, arbitration's effectiveness to resolve commercial B2B disputes may be diminished.

A. *Using Arbitration To Resolve Cross-Border Consumer Disputes Means Most Consumers Will Not Be Able to Seek Redress*

There is a greater chance of abuse when arbitration is used in cross-border consumer disputes.[241] Most likely, cross-border consumer transactions will occur online.[242] The consumer cannot be sure which laws apply to the transaction because regulations or treaties governing Internet commerce are lacking.[243] The European Union has instituted some regulation, but it only applies to transactions between merchants and consumers in the European Union.[244] Not only are consumers effectively shut out from redress, but arbitration allows inconsistent treatment of the parties based on which jurisdiction they come from.[245]

1. Consumers Will Not Be Able to Seek Redress

At the outset of a dispute involving an arbitration clause, the consumer should challenge the arbitration agreement to avoid arbitration in the first place. An arbitration agreement that involves a cross-border transaction will likely come under the N.Y. Convention,[246] but national law may play a part as well.[247] The

241. *See supra* note 105 and accompanying text (discussing potential for defrauding cross-border consumers). *See also supra* note 224 and accompanying text (discussing how e-commerce dispute resolution is more complicated and no standards are currently in place).

242. *See supra* note 105 and accompanying text (discussing potential for abuse in consumer cross-border transactions). *See also supra* note 224 and accompanying text (discussing increase in B2C Internet commerce).

243. *See supra* note 225 and accompanying text (providing examples of E.U. legislation, as well as OECD guidance, that sets standards for B2C online commerce).

244. *See supra* note 226 and accompanying text (discussing draft Hague Convention and protections it offers consumers).

245. *See supra* notes 77-86 (establishing that United States has pro-arbitration policy for consumer disputes but European Union is more protective of its consumers by allowing Member States to pass more restrictive legislation).

246. *See supra* note 176 and accompanying text (discussing when N.Y. Convention applies and stating that it may apply to consumer disputes of commercial nature). *See also supra* note 183 and accompanying text (suggesting what definition of "commercial" relationship is under N.Y. Convention and noting that Member State could exclude consumer transactions under definition).

247. *See supra* notes 178-79 and accompanying text (discussing that N.Y. Convention is codified in national legislation such as FAA and English Arbitration Act and recognizing that N.Y. Convention may overlap with national sources of law as to enforceability and recognition).

consumer could challenge the agreement as a violation of public policy or that the subject matter is inarbitrable.[248] Unfortunately, under the N.Y. Convention and the ICC rules, for example, challenges to the arbitration agreement are decided by the arbitral tribunal.[249] So even if the consumer challenged the agreement, the arbitral tribunal at a minimum would be impaneled to determine arbitrability, if not to rule on the entire dispute.[250]

If the consumer was not discouraged by this fact and went forward with challenging the agreement, the chance of success is minimal. Public policy, non-arbitrability and unconscionability defenses to enforcement of arbitration agreements are rare under both U.S. arbitration law and the N.Y. Convention.[251] Also, because the dispute is between parties from different Nations and legal jurisdictions, it is not clear which jurisdiction's laws apply to determine challenges to the arbitration agreement.[252] For example, a U.S. consumer would not fare well if it challenged the agreement because the agreement is probably enforceable under U.S. law.[253] An E.U. consumer, in contrast, might have a better opportunity to get the arbitration clause removed from the contract because such agreements are deemed unfair terms under the Consumer Directive.[254] That may not

248. *See supra* notes 198-202 and accompanying text (discussing that public policy and non-arbitrability of subject matter may be defenses to enforcement under N.Y. Convention).

249. *See supra* notes 187-88 and accompanying text (discussing that arbitrators have authority to determine disputes over validity and enforceability of arbitration agreements and that it is very difficult for national courts to stay arbitration proceedings under N.Y. Convention).

250. *See id.*

251. *See supra* notes 203-04 and accompanying text (recognizing that some jurisdictions, such as United States, apply public policy defense to arbitration agreements and awards more narrowly in foreign public policy situations under N.Y. Convention). *See also supra* note 214 and accompanying text (recognizing that courts are reluctant to find international arbitration agreements under N.Y. Convention unconscionable).

252. *See supra* notes 207-08 and accompanying text (discussing that N.Y. Convention is silent as to law that applies to arbitration agreement and non-arbitrability determinations but that presumption is law of country where arbitration applies).

253. *See supra* notes 125-28 and accompanying text (discussing that arbitration agreements in United States are subject to same enforceability requirements as regular contracts, but that U.S. courts treat arbitration agreements presumptively valid). *See also supra* note 204 and accompanying text (discussing that public policy and non-arbitrability are limited defenses under N.Y. Convention and U.S. law).

254. *See supra* notes 62-72 and accompanying text (discussing how binding predispute consumer arbitration is not banned explicitly by Consumer Directive but that

even matter though, because the arbitrators making such a determination do not have to apply any particular law.[255] They may choose an equitable remedy that does not result from the laws of either the consumer's or the merchant's jurisdiction.[256] Even the U.S. Supreme Court, which consistently upholds consumer arbitration agreements, maintains that statutory rights should be vindicated,[257] but it is unlikely that arbitration proceedings can offer this level of protection without some substantive review of arbitrators' decision in statutory matters.

Even if the arbitration agreement is found unenforceable, the picture for the consumer is still bleak. The underlying contract would likely remain intact because the arbitration agreement is separable from the contract.[258] The result would be a contract with an uncertain dispute resolution method, likely defaulting to local court procedures.[259] The arbitration agreement was at least in part meant to avoid this result in the first place.[260]

If the consumer did go forward with the arbitration and an award was rendered, the consumer would have to argue the

---

practice has effectively been adopted). *See also supra* note 76 and accompanying text (discussing that English Arbitration Act seems to ban binding pre-dispute arbitration agreements with consumers).

255. *See supra* notes 132-36 and accompanying text (recognizing that arbitrators do not need to correctly apply laws, and that arbitration award may be overturned under U.S. law for manifest disregard, which is rare). *See also supra* notes 189-90 and accompanying text (discussing limits on judicial review of merits of arbitration awards and how arbitrators are not required to correctly apply law of any jurisdiction).

256. *See supra* note 190 and accompanying text (discussing that arbitrators do not have to decide according to particular law and may even apply *lex mercatoria* for whatever rules of law they deem appropriate).

257. *See supra* notes 145-47 and accompanying text (discussing cases where courts held that prohibitive arbitration costs could preclude vindication of statutory rights).

258. *See supra* note 186 and accompanying text (describing what separability of arbitration agreement means and how institutional arbitration rules support doctrine).

259. *See supra* note 186 and accompanying text (discussing separability doctrine and arbitration provider rules that treat arbitration agreement separate from underlying contract and fact that underlying contract is not affected by unenforceability of arbitration agreement and vice versa). If the arbitration clause is defective, however, there may be judicial and arbitral proceedings where the scope or enforceability of the provisions and the merits of the dispute have to be litigated. *Id. See also supra* note 62 and accompanying text (stating that unfair terms under Consumer Directive are not enforceable, but that this does not invalidate underlying contract).

260. *See supra* note 90 and accompanying text (discussing disadvantages to cross-border litigation that encouraged commercial parties to arbitrate). *See also supra* notes 109-115 and accompanying text (discussing arbitral advantages over litigation to commercial parties that do not necessarily transfer to consumers).

award was unenforceable.[261] This would be done in the court where enforcement was sought, and that could mean litigation in a foreign court and under foreign law.[262] Both the United States and European Union limit the grounds for appeal of an arbitrator's award and decisions on arbitrability.[263] In the European Union this is not necessarily fatal to consumers because the Directive makes the arbitration of consumer disputes all but non-existent.[264] The limited review in the United States, however, combined with a lack of reasoned awards, creates the risk a dispute may be decided incorrectly with no remedy for those protected by the legislation.[265]

Furthermore, consumers may find that arbitration is an overly burdensome way of resolving their disputes. The amounts involved in such disputes are typically small, averaging around USD 300.[266] A consumer could be faced with paying filing fees and administrative costs, arbitrator compensation, and attorney's fees in order to proceed with the arbitration.[267] If the arbitration agreement provides for rules that utilize consumer protocols, the consumer's arbitration costs may be capped at several

---

261. *See supra* notes 198-203 and accompanying text (discussing public policy exception to enforcement of arbitral award under N.Y. Convention art. V and its narrow application).

262. *See supra* note 206 and accompanying text (referring to N.Y. Convention art. V(2)(a) as providing that law of country where recognition and enforcement is sought as law which applies to determine if subject matter of difference is not capable of settlement of arbitration).

263. *See supra* note 156 and accompanying text (discussing very limited opportunity to overturn arbitration awards in United States). *See also supra* note 191 and accompanying text (discussing limited review of awards under N.Y. Convention).

264. *See supra* notes 77-80 and accompanying text (discussing that European Union does not allow binding pre-dispute consumer arbitration).

265. *See supra* notes 132-33 and accompanying text (discussing that arbitrators need not decide according to law and even clear errors in interpretation of law are insufficient to overturn arbitration awards, unless manifest disregard is shown). *See also supra* notes 136-37 and accompanying text (discussing that vacation of arbitration award for manifest disregard of law is very rare especially since arbitrators are not required to give reasoned awards). The European Union does not even allow pre-dispute binding arbitration with its consumers. *See, e.g., supra* notes 77-80 and accompanying text (discussing that European Union does not allow binding pre-dispute consumer arbitration).

266. *See supra* note 140 and accompanying text (discussing relatively small dollar amount of consumer claims as compared to costs of arbitrating or filing in small claims court and noting that average consumer claim is USD 300).

267. *See supra* notes 142-44 and accompanying text (discussing how arbitration is usually more expensive than litigation for consumer claims because small claims court consists only of filing fee and no attorney fees).

hundred dollars.[268] The consumer could also incur attorney's fees if he feels he wants representation. The small amount of money at stake in the dispute compared to the costs of arbitration may deter the consumer from pursuing the action in the first place.[269]

Consumers may also find that the lack of judicial involvement in arbitration puts them at a disadvantage. Business parties prefer arbitration because its simplified process is not hampered by court rules and procedures.[270] Court rules and procedures, however, are precisely what ensure due process for consumer dispute resolution.[271] Truncated proceedings, limited discovery, and limited review of the arbitrator's decision do not help consumers and may actually interfere with their statutory rights.[272]

2. Arbitration Allows Inconsistent Treatment of the Parties Based Upon which Jurisdiction They Come From

The U.S. and E.U. policies on consumer arbitration are generally opposed to each other.[273] It is unclear how a consumer will be treated when one party comes from a pro-arbitration jurisdiction and the other doesn't.

The fact that some of the major computer manufacturers

---

268. *See supra* notes 49-56 and accompanying text (discussing arbitral providers such as AAA, NAF, and JAMS adoption of Consumer Rules that provide reduced fees).

269. *See supra* note 224 and accompanying text (discussing viability of ODR for B2C transactions and recognizing that it is intrinsically multi-jurisdictional and exceedingly complex, yet subject to severe financial limitations because many B2C disputes involve dollar values that are relatively low). *See also supra* notes 141-42 and accompanying text (discussing that victims are less likely to seek vindication of rights when high transaction costs and highlighting that consumers typically face large arbitration costs in comparison to value of claims).

270. *See supra* note 119 and accompanying text (noting arbitration generally eliminates pretrial motion and discovery practice, and informality of arbitration means less time preparing for hearings and presenting evidence).

271. *See supra* note 111 and accompanying text (discussing how arbitration's procedural informality as compared to litigation appeals to business parties).

272. *See supra* notes 118-19 and accompanying text (discussing how disputes in consumer cases are not really helped by arbitration and that simplified arbitration procedures such as informal discovery can harm consumers). *See also supra* note 206 and accompanying text (discussing that erosion of public policy defenses under N.Y. Convention displaces public law).

273. *See supra* notes 77-86 and accompanying text (discussing U.S. pro-arbitration stance regarding consumer disputes and contrasting it with European Union policy of allowing Member States to pass more restrictive consumer legislation).

specifically do not include arbitration clauses in their contracts with E.U. customers indicates that the E.U. will probably not enforce a binding pre-dispute arbitration agreement against an E.U. consumer,[274] or at least merchants seem to think so. In contrast, a U.S. consumer may be forced to arbitrate a dispute with an E.U. merchant. Unless the agreement is unenforceable under normal contract standards, it will be enforced.[275] If the consumer participated in the arbitration and an award was made, the award will be recognized unless it meets a statutory exception under the FAA or the award was made in manifest disregard of the law.[276] This creates an unlevel playing field not only between merchants and consumers, but also between consumers purchasing in the cross-border market as well.

In the European Union, legislation prohibits arbitration agreements that require consumers to arbitrate in a distant forum.[277] The United States, however, does not have corresponding legislation, and instead a consumer would have to demonstrate unconscionability for the agreement to be unenforceable, and inconvenience of forum alone does not meet this requirement.[278] The consumer may also find that the costs of arbitrating in the distant forum are not worth the trouble.[279] Litigation in this instance in inevitable because the consumer must challenge the arbitration agreement in court and prove prohibitive costs.[280]

---

274. *See supra* note 26 and accompanying text (discussing survey that determined top computer manufacturers modify arbitration clauses based on consumer's locality).

275. *See supra* notes 125-28 and accompanying text (discussing that arbitration agreements are presumptively valid in United States unless demonstrate contract defenses such as fraud, duress, or unconscionability).

276. *See supra* notes 156-165 and accompanying text (discussing U.S. court's reluctance to overturn arbitration awards or find agreements unenforceable and discussing narrow statutory and common law grounds for vacation of arbitration awards under FAA).

277. *See supra* note 225 and accompanying text (discussing Brussels I and Distance Selling Directive that offer protections for E.U. consumers).

278. *See supra* note 214 and accompanying text (discussing *Gateway 2000* decision that found inconvenience of forum selection clause not unconscionable).

279. *See supra* note 224 and accompanying text (recognizing inadequacy of current ADR methods and discussing new forms of dispute resolution to help reduce transaction costs for small value disputes and to erect structures that work well across national boundaries). *See also supra* notes 140-43 and accompanying text (discussing how transaction costs of arbitrating consumer claims compared to amount in dispute discourages consumers to seek redress).

280. *See supra* note 153 and accompanying text (noting that burden is on con-

Furthermore, the Internet is the most likely place for a cross-border consumer transaction to occur,[281] and it complicates determining which laws apply and which approach governs transactions.[282] For example, the United States' insistence on pre-dispute mandatory consumer arbitration has so far stalled attempts at unified dispute resolution procedures in the online marketplace.[283] The absence of guidelines for dispute resolution in such transactions only makes the situation more uncertain for both consumers and merchants.[284] This clearly will not increase consumer confidence in cross-border shopping.

B. *The Purported Savings in Transactional Costs are Not Realized*

Another purported benefit of arbitration is that it is cheaper and faster than litigation.[285] When utilized in consumer dispute resolution, however, the cost savings are not really present for consumers. In contrast to arbitration in B2B transactions, the cost savings are not necessarily realized by the merchant either.

1. Arbitration is Not Necessarily Cheaper for Consumers

Supporters of arbitration argue that because businesses cut down on transaction costs by using arbitration, such savings are passed on to consumers in lower prices.[286] For consumers in cross-border transactions, however, arbitration is not really a good bargain. The consumer sacrifices the due process protec-

---

sumer to prove prohibitive costs in arbitration if he seeks to invalidate arbitration agreement).

281. *See supra* note 105 and accompanying text (discussing potential for abuse in consumer cross-border transactions). *See also supra* note 224 and accompanying text (discussing increase in B2C Internet commerce).

282. *See supra* notes 230-31 and accompanying text (contrasting U.S. policy of pro-arbitration in consumer transactions and E.U. policy that disfavors it). *See also supra* note 232 and accompanying text (discussing *Yahoo!* case and demonstration of difficulties of E.U. courts trying to apply domestic laws to Internet disputes).

283. *See supra* notes 227-28 and accompanying text (describing stalled Hague Convention negotiations and offering suggestions for uniform regulation).

284. *See supra* notes 5, 8, 23, 24 and accompanying text (discussing current lack of consumer confidence in online shopping and recognizing that no current uniform system exists for online B2C dispute resolution).

285. *See supra* note 138 and accompanying text (stating that one of arbitration's purported benefits is its cost savings).

286. *See supra* note 116 and accompanying text (suggesting that consumers may be better off participating in binding pre-dispute arbitration because they ultimately benefit). *See also supra* note 117 and accompanying text (discussing how consumers benefit from standardized contracts).

tions of a court.[287] The consumer however, does not experience the benefits typically associated with arbitration such as expert decision-making, procedural simplicity and flexibility, finality, confidentiality, and cost savings.[288] The proceedings may be governed by a consumer protocol that provides due process protections such as lower costs, expanded authority of the arbitrator to award any remedy available in court, reasoned awards, and the option to go to small claims court after an award is rendered.[289] Such protections, however, are not automatic and a merchant may choose to use different rules that do not offer such protections.[290]

Prohibitive costs so far seem to be the only aspect that the courts entertain to refuse enforcement of arbitration agreements.[291] If the arbitration does not use separate consumer rules that cap the costs of arbitration, the consumer may challenge the agreement based upon the *Green Tree* decision.[292] This of course consists of litigation in a court, and the consumer probably should have a lawyer.[293] It is also the consumer's burden to prove prohibitive costs.[294] Most likely, however, the

287. *See supra* notes 16-17 and accompanying text (discussing criticism of arbitration as possibly displacing government's role in consumer protection and resulting in unconscionable transactions and dispute resolution methods).

288. *See supra* notes 110-15 and accompanying text (discussing benefits of arbitration, such as expert decision-making, procedural simplicity and flexibility, finality, confidentiality, cost-savings, and avoidance of forum selection and litigation bias). *See also supra* note 118 and accompanying text (asserting that typically cited benefits to arbitration do not transfer to consumers).

289. *See supra* notes 44-59 and accompanying text (discussing AAA, NAF, and JAMS consumer protocols that provide protections such as lower costs, expanded authority of arbitrator to award any remedy available in court, reasoned awards, and option to go to small claims court).

290. *See supra* note 48 and accompanying text (discussing how business may choose not to use consumer protocols in arbitration agreement).

291. *See supra* notes 147-55 and accompanying text (discussing *Green Tree* and *Gutierrez* decisions and courts' holdings that prohibitive arbitration costs may make arbitration agreement unenforceable but burden of proving such costs is on consumer).

292. *See supra* notes 147-55 and accompanying text (discussing U.S. courts' holdings that arbitration agreement may be held unenforceable if consumer can prove prohibitive costs).

293. *See supra* note 128 and accompanying text (providing examples of cases where consumers or employees challenged arbitration agreements as unenforceable). *See also supra* notes 147-55 and accompanying text (discussing additional cases where consumers challenged arbitration agreements an unenforceable because arbitration was cost prohibitive).

294. *See supra* notes 153-55 and accompanying text (discussing *Green Tree, Gateway 2000, Gutierrez,* and *Mendez* cases and consumer's burden of proving prohibitive costs).

amount in dispute does not justify spending thousands of dollars on attorney's fees to demonstrate that costs are actually prohibitive.[295] Also because the burden is on the consumer, one wonders what would happen to a consumer that has the misfortune of not being poverty stricken. In such instances, the *Green Tree* decision and its progeny infer that the more means a consumer has to pay costs, the higher the arbitration costs can be before a court will refuse to enforce the arbitration agreement.[296] It seems like an expensive bargain to just save a few dollars when the product or service was purchased. Of course, E.U. consumers should not fret such matters, because the arbitration agreement would probably not be enforced in the first place.[297]

2. Arbitration is Not Necessarily Cost-Effective for Businesses

The business community should also question the cost effectiveness of using binding arbitration clauses in consumer transactions. There is a risk of enforceability challenges, which results in litigation costs anyway.[298] Consumer advocate groups and legislators are also aware of arbitration's controversy,[299] and a business risks becoming the poster representative of all that is wrong with consumer arbitration.

If merchants hope to reach the cross-border markets, they will also have to consider jurisdictions such as the European

---

295. *See supra* notes 140-41 and accompanying text (stating that most consumer complaints are for small dollar amounts and that consumers may be discouraged to pursue claims).

296. *See supra* notes 147-55 and accompanying text (discussing court decisions that evaluated consumers' ability to pay arbitration costs in determination of whether arbitration agreement was enforceable).

297. *See supra* notes 62-76 and accompanying text (discussing how practice of enforcing binding pre-dispute arbitration agreements against consumers in European Union and Member States is effectively non-existent).

298. *See supra* notes 147-55 and accompanying text (providing examples of consumer challenges to arbitration agreements that were litigated in court, even up to U.S. Supreme Court). *See also supra* notes 197-200 and accompanying text (discussing challenges to arbitration agreement and arbitration award under N.Y. Convention). Even if, because of the separability or competence-competence doctrine, the arbitral tribunal instead of a court determines issues of enforceability, additional arbitration costs may be incurred through a longer or more involved arbitration proceeding.

299. *See supra* notes 36-38 and accompanying text (discussing U.S. legislative attempts to restrict arbitration agreements with consumers). *See also supra* notes 100-03 and accompanying text (noting unsuccessful U.S. House and Senate bills attempting to restrict arbitration's use and legal commentators' recognition of arbitration controversy).

Union that do not allow the binding pre-dispute consumer arbitration agreements typically included in contracts.[300] This may mean that the merchant has to draft different contracts for use in different jurisdictions and become familiar with the national laws regarding arbitration of each jurisdiction it does business in.[301] There is also more uncertainty when dealing with cross-border consumers. There is no uniform set of laws in place to govern such transactions, and there is considerably more uncertainty how disputes will be handled, even with binding arbitration agreements.[302] The merchant also risks incurring litigation expenses, because the consumer or an agency authorized to bring an action on behalf of the consumer may challenge an agreement or an award.[303] Such a possibility threatens the binding and final nature of arbitration.[304] This seems like a lot of additional risk for the merchant, especially when it could be avoided by using a non-binding ADR method other than arbitration.[305]

---

300. *See supra* notes 62-76 and accompanying text (stating unfair terms under Consumer Directive are void and recognizing that even though binding pre-dispute consumer arbitration is not banned explicitly by Consumer Directive, practice has effectively been adopted). *See also supra* note 26 and accompanying text (discussing survey that determined top computer manufacturers modify arbitration clauses based on consumer's locality and they did not include binding arbitration agreements in contracts with E.U. consumers).

301. *See supra* note 26 and accompanying text (discussing survey that determined top computer manufacturers modify arbitration clauses based on consumer's locality and they did not include binding arbitration agreements in contracts with E.U. consumers). *See, e.g., supra* notes 77-86 and accompanying text (recognizing that United States and European Union approach consumer arbitration and consumer protection issues differently).

302. *See supra* note 105 and accompanying text (discussing potential for abuse in consumer cross-border transactions). *See also supra* notes 224-32 and accompanying text (discussing increase in B2C Internet commerce and contrasting U.S. policy of pro-arbitration in consumer transactions and E.U. policy that disfavors it). *See, e.g., supra* notes 281-282 and accompanying text (discussing lack of legislation or uniform rules for Internet transactions).

303. *See supra* note 186 and accompanying text (discussing that defective arbitration agreement can result in judicial and arbitral proceedings that determine enforceability of provision and merits of dispute). *See also supra* note 83 and accompanying text (describing that E.U. agencies such as OFT may bring actions on behalf of consumers).

304. *See supra* notes 90, 112 and accompanying text (discussing preference of international arbitration because of final and binding nature of decisions that avoid review by national courts, but also recognizing problematic if agreement is defective because it results in judical or arbitral determination of dispute on merits).

305. *See supra* notes 27-28 and accompanying text (discussing differences between arbitration and other ADR methods).

The consensus is that cross-border commerce, especially in the e-commerce context, is far below its potential.[306] By eliminating consumer distrust, consumers are more likely to purchase products and services from retailers in distant forums.[307] Having an understandable and fair process for dispute resolution goes a long way to eliminating the distrust. A merchant could greatly increase its potential customer base if consumers have more confidence in purchasing from a cross-border merchant.

C. *Allowing Arbitration of Cross-Border Consumer Claims Threatens Arbitration's Use for Commercial Disputes Between Business Parties*

Arbitration traditionally offered business parties a way to maintain control over their dispute resolution.[308] It also offered a way to keep courts and regulators out of a business' affairs.[309] The use of binding arbitration in consumer disputes, however, has shone the spotlight right where merchants do not want it to be. Federal and state legislators are already attempting to pass laws that limit the use of arbitration in consumer agreements.[310] So far, they have not been successful.[311] Creative legislative drafting, however, may soon get around the FAA's preemption problem.[312] The *Green Tree* decision and pressure on the primary arbitration providers has already resulted in changes to ar-

306. *See supra* notes 23-24, 35 and accompanying text (discussing lack of consumer confidence in cross-border transactions and its negative effect on commerce).

307. *Id.* (discussing how current consumer distrust of online shopping hampers growth of Internet commerce).

308. *See supra* notes 87-107 and accompanying text (discussing historical preference for arbitration and offering statistics that demonstrate arbitration's popularity).

309. *Id.* (explaining how arbitration allowed commercial parties to resolve disputes within their own industries and without typical litigation complications).

310. *See supra* notes 36-38 and accompanying text (discussing that state efforts to restrict use of arbitration in consumer transactions are preempted by FAA and providing examples of Congressional attempts to pass protective legislation). *See also supra* notes 100-02 and accompanying text (providing examples of failed U.S. state legislation that attempted to restrict arbitration).

311. *See supra* notes 36-38 and accompanying text (recognizing that FAA preempts state legislative efforts to protect consumers in arbitration). *See also supra* notes 100-02 and accompanying text (providing examples of failed U.S. legislation in Montana and Vermont that attempted to restrict arbitration and cases that found such legislation preempted by FAA).

312. *See supra* note 38 and accompanying text (referring to New Mexico's recently adopted Fair Bargain Act, which applies to all standard form contracts or leases and its attempt to make arbitration fairer to consumers). Because it applies across-the-board to form contracts, whether they include a mandatory arbitration clause or not, the act is

bitration rules that were tailored to business disputes.[313] The E.U. has effectively banned pre-dispute consumer arbitration agreements, limiting the options for merchants in those jurisdictions.[314] There is also a movement under foot to amend the N.Y. Convention and FAA to account for non-business parties, or possibly institute a different standard of judicial review in consumer and employment arbitration awards.[315] The N.Y. Convention has become a staple in the resolution of commercial disputes,[316] there is no need to interfere with its effectiveness because of the emergence of B2C commerce.

CONCLUSION

Increased consumer participation in cross-border shopping increases the need for an effective form of dispute resolution. Arbitration cannot currently meet this need. To make arbitration an effective form of dispute resolution for all parties involved requires extensive revisions to current national laws such as the FAA, the N.Y. Convention, and arbitral provider practices. Currently, there are opposing national policies regarding whether binding pre-dispute consumer arbitration is appropriate, and there does not seem to be any consensus on how to make cross-border shopping fair for consumers and merchants from different jurisdictions. More frequently, consumers will be confronted with ineffective dispute resolution options when their on-line shopping transactions go badly. This will continue to hamper e-commerce and will negatively affect both consumers and businesses that miss out on all that cross-border shopping has to offer. By placing the lid back on the box, the bene-

---

not anti-arbitration, but pro-fair-arbitration, which is consistent with the philosophy of the Federal Arbitration Act, and should survive pre-emption challenges. *Id.*

313. *See supra* notes 43-59 and accompanying text (discussing implementation of U.S. arbitration provider consumer protocols and additional protections to consumer arbitration procedures).

314. *See supra* notes 72, 76 and accompanying text (noting that binding pre-dispute consumer arbitration is effectively non-existent in E.U. and Member States such as United Kingdom).

315. *See supra* note 228 and accompanying text (discussing dispute resolution options to account for online B2C commerce, such as amending N.Y. Convention creating new legislation or treaties that address common concerns, or expanding judicial review of arbitral awards).

316. *See supra* note 176 and accompanying text (discussing history of N.Y. Convention and how it is regarded as most significant contemporary international agreement relating to commercial arbitration).

fits of arbitration that commercial parties have come to cherish can remain intact. Arbitration has proven itself in B2B dispute resolution, and it is unwise to attempt to morph it into something that would no longer serves the needs of cross-border commerce.